accepts the figures put forward; this most recent statement appears to acknowledge that N$1,000,000 of work had been done.

196.6. During the Hearing, I noted the amount in question was actually higher than the N$1,000,000 claimed. The Claimant stated it did not wish to amend its claim. Despite an outburst by Mr Tarens regarding interest, I interpreted the Claimant's statement that it would not amend its claim to seek a higher amount as a sign of good faith by the Claimant.

197. As there is no substantial disagreement as to the amount claimed by the Claimant in regards to its mitigation works, and as there is considerable evidence put forward by Mary Bell (under the business records exception to the hearsay rule) and confirmed by expert Evan Llywd, I accept the sum of N$1,000,000 as representing the cost of materials expended by the Claimant in undertaking mitigation works.

198. N$1,000,000 therefore constitutes just compensation for the Claimant's mitigation efforts.

THE AWARD

199. For all of the reasons given above, I make the following findings of fact and law.

Summary of Preliminary determination regarding jurisdiction in relation to Notice of Arbitration

200. I find that I have jurisdiction to see this matter. I find that a typographical error or confusion as to the spelling of the name of a party does not invalidate a Notice of Arbitration. There are cost implications to be taken into account for this matter.

Summary of Preliminary determination regarding jurisdiction in relation to arbitration clause

201. I find that I have jurisdiction to see this matter. I find that the Arbitration Clause as agreed between the Parties does not impose the constitution of a Dispute Board as a condition precedent to the filing of a Notice of Arbitration. There are cost implications to be taken into account for this matter.

Summary of Evidential determination

202. I find the document discovered by the Claimant, who attempted to introduce it into evidence, to be inadmissible as a privileged document as a confidential document between the Respondent and its counsel. There are cost implications to be taken into account for this matter.

Summary of the Substantial Issue concerning non-payment of IPCs and Advanced Payment

203. I find that IPCs 5-8 are properly certified and remain payable. I find that the Advance Payment may not be used to cover outstanding sums due on IPCs 5-8, as the Advance Payment has been consumed by activities attributable to the Contract.

204. As such, the Claimant is granted a declaration to the effect that IPCs 5-8 were duly certified and are payable, the Respondent is ordered to pay the Claimant the principal sum of:

204.1. **E£3,000,000 for the unpaid IPCs**

205. Interest shall run on each IPC from the date it because payable, and shall be calculated in the 'restitutionary' manner described below.

Summary of the Substantial Issue concerning mitigation works done on Tank Room No. 8

206. I find that the mitigation works done on Tank Room No. 8 fall outside the provisions concerning variations contained within Clause 13. I find that the Respondent breached multiple obligations under the Contract, requiring the Claimant to mitigate its losses. I find the manner in which the Claimant mitigated its loss, by undertaking works to remedy design flaws produced by the Respondent, to have been reasonable. I find that there is no dispute as to the value of those works.

207. As such, the Claimant is granted an award of:

207.1. **E£1,500,000 for the costs of the changes made to Tank Room 8**

208. Interest shall run on this claim from 1 November 2020, and shall be calculated in the 'restitutionary' manner described below.

Summary of Interest

209. I find that I have the authority to award interest based on general compensatory and restitutionary principles. The UNCITRAL Model Law and the UNCITRAL Rules are silent as to my authority, and I have not been presented with the law relating to the award of interest of the seat of arbitration, Easthead.

210. A distinction[10] must be made between primary liabilities that principally take the form of a debt, and secondary liabilities that principally take the form of damages. A compensatory award looks to what a claimant has lost, whereas a restitutionary award looks to the benefit that has accrued to the respondent. It is for this reason that simple interest is awarded for compensatory awards, as damages reflect a claimant's loss. On the other hand, compound interest is awarded as it represents what use a respondent could make with the benefit in his hands.

[10] The following analysis employs arguments made in *Sempra Metals Ltd v Inland Revenue Commissioners* [2007] UKHL 34. The ruling of the Supreme Court in *Prudential Assurance Co Ltd v Revenue and Customs Commissioners* [2018] UKSC 39 concerns statutory interpretation and does not affect the conceptual analysis.

211. I categorize the awards to the Claimant as follows:

211.1. Non-payment of IPCs concerns outstanding debts, and thus a restitutionary award is appropriate.

211.2. Works undertaken in mitigation of loss, in the hands of the Respondent, are a proprietary benefit, and thus a restitutionary award is appropriate.

211.3. Costs merely compensate the Claimant for expenditure in this arbitration, and thus a compensatory award is appropriate.

212. It is far beyond the scope of this arbitration to make provisions for an additional award for interest, let alone based on the "subjective devaluation" the Respondent might ascribe to the benefit in his hands. Indeed, the categorization of the Claimant's claims as compensatory or restitutionary might already be considered generous to the Claimant. To that end, I have adopted the Sterling Overnight Index Average (SONIA), a risk-free rate (i.e., generous to the Respondent) that is compounded daily, which has replaced LIBOR, for the following restitutionary awards.

213. In undertaking these calculations, I have made use of the calculator found on this website: https://www.realisedrate.com/SONIA

214. I award the following restitutionary interest awards, based on an award date of 13 June 2022:

Claim	Date	Original value (N$)	Award (N$)	Award (E£)
IPC 5	28 January 2021	500,000	1,485.16	2227.74
IPC 6	28 February 2021	500,000	1,465.79	2198.685
IPC 7	28 March 2021	500,000	1,445.03	2167.545
IPC 8	28 April 2021	500,000	1,424.99	2137.485
Mitigation works	1 November 2020	1,000,000	3,093.04	4639.56
Total				13,371.015

215. I award the following for compensatory interest awards, as determined in the "Costs" section below. I have taken the average Bank of England interest rate as the basis for a calculation of simple interest, where 2021 had an average rate of 0.1%, and 2022 had an average rate of 0.2%.

Claim	Date	Original value (E£)	Interest rate	Award (E£)
Claimant's costs	13 June 2022 (0 days)	350,000	0.2	0
Claimant's fees	15 July 2021 (333 days)	29,000	0.15	39.69
Claimant's fees	14 February 2022 (119 days)	29,000	0.2	18.91
Total				58.6

216. Thus, on the date of the Award, I award the Claimant 13,429.615 in interest.

217. I order that the unsuccessful party is to be given a grace period of 14 days from the date of this award to make payment to the successful party, during which time no interest shall run.

218. In regards to post-award interest, on standard principles, I have discretion to award a higher interest rate to deter non-compliance.

219. Should the unsuccessful party fail to make payment within this 14-day period, interest will run from the 15th day at a rate of 2*SONIA rate calculated daily for restitutionary interest awards and 8% simple interest rate calculated daily compensatory awards, for non-compliance with the award. I consider this rate to be appropriate and proportionate.

Summary of Costs

220. I find that I have the authority to award costs pursuant to Article 40 et seq of the UNCITRAL Rules, the Parties' requests, and their agreement in the Preliminary Meeting. This authority is subject to the Parties' agreement, made at the Preliminary Meeting, that costs be capped at E£500,000 per party total.

221. Article 42 of the UNCITRAL Rules provides,

1. The costs of the arbitration shall in principle be borne by the unsuccessful party or parties. However, the arbitral tribunal may apportion each of such costs between the parties if it determines that apportionment is reasonable, taking into account the circumstances of the case.

2. The arbitral tribunal shall in the final award or, if it deems appropriate, in any other award, determine any amount that a party may have to pay to another party as a result of the decision on allocation of costs.

222. I have been presented with evidence of three settlement offers prior to the filing of the Notice of Arbitration.

222.1. On 7 June 2021, the Claimant made a first offer of N$3,000,000 in outstanding payments and the return of the letter of credit. The Respondent refused to pay this amount, and though it did not cash the letter of credit, it threatened to do so.

222.2. On 15 June 2021, the Respondent made an offer of N$1,000,000 and offered to return the letter of credit. The Claimant summarily refused this offer on 16 June 2021.

222.3. On 20 June 2021, the Respondent made an offer of N$1,500,000. The Claimant refused this offer on 1 July 2021, shortly before issuing the Notice of Arbitration.

223. I have been presented with evidence concerning the payment of the costs of the arbitration. The Respondent has refused to pay any fees during the process, and the Claimant has paid the entirety of the costs, including a total of E£29,000 on behalf of the Respondent, after I said I would withhold the Award until payment of the outstanding costs and fees was made.

223.1. The Claimant has paid E£18,000, the entire cost of the arbitration.

223.2. The Claimant has paid E£40,000, my arbitrator's fees.

224. The Parties have submitted cost sheets in regards to the arbitration:

224.1. The Claimant has claimed E£350,000.

224.2. The Respondent has claimed E£1,200,000, which it has claimed to be reasonable despite the agreed cap.

225. I note the following actions undertaken by the Claimant that have negatively affected proceedings:

225.1. The Claimant sought to introduce documentary evidence of a privileged nature. This required me to have the Parties submit short written briefs on the matter and address the admissibility over the period of one hour on 13 January 2022.

225.2. Mr Tarens, Managing Director for the Claimant, verbally interrupted proceedings to make a joke in regards to the accumulation of interest on the mitigation works.

226. I note the following actions undertaken by the Respondent that have negatively affected proceedings:

226.1. The Respondent sent an email to me, the EAI, and the Claimant on 15 July 2021, denying that I had been properly appointed and denying that the tribunal had been properly constituted, in violation of UNCITRAL Rules Article 3(5).

226.2. The Respondent brought a jurisdictional challenge in regards to a typographical error in its name in the Notice of Arbitration. Most concerns about the identification of parties involve members of corporate groups and new corporate entities following mergers and acquisitions. This jurisdictional challenge bordered on frivolous.

226.3. The Respondent brought a jurisdictional challenge in regards to the interpretation of the Arbitration Clause. The Arbitration Clause quite obviously did not impose the constitution of a Dispute Board as a condition precedent to the bringing of arbitral proceedings. This jurisdictional challenge bordered on frivolous.

226.4. The Respondent violated its agreement with the Claimant, and Order for Directions No. 1, by violating the cap on costs agreed at the Preliminary Meeting.

226.5. The Respondent has claimed excessive fees, nearly four times greater than those claimed by the Claimant, without explanation. The Respondent asserted in its Defence, without basis, a right to claim those fees in violation of the agreed cap.

226.6. The Respondent has failed to make any payments in respect of the fees of the arbitration or my fees as arbitrator.

227. I note that the Respondent has not properly pleaded it should be awarded costs, as its statement in its Defence as regards costs was not within its Prayer for Relief.

228. On balance, the Respondent's behaviour during proceedings has been considerably more disruptive than the Claimant's behavior.

229. Given that the Claimant has been overwhelmingly successful in this arbitration and I see no other indication against a full cost order, I find that the Respondent is liable for both its own fee and the whole of the Claimant's party costs.

230. The Claimant submitted a cost sheet indicating its legal fees to be E£350,000 and the Respondent has submitted a cost sheet indicating its legal fees to be E£1,200,000. Given that I find the Respondent liable for the Claimant's fees and the Respondent's fees are far in excess of the Claimant's, I see no reason to go into a discussion of the proportionality of these fees.

231. The Respondent engaged in settlement negotiations; however, the Respondent's offers were far below what was ultimately ordered. I also note that it was the Claimant who made the first offer, and that offer closely resembles the sums ultimately awarded to the Claimant. Had the Respondent simply accepted the Claimant's offer, arbitration could have been avoided, as the outcome would have been essentially the same. If blame for the institution of proceedings is to be assigned, it lies with the Respondent.

232. The costs to be borne in this arbitration are as follows:

232.1. The Claimant's request for its legal fees of E£350,000 is **granted**.

232.2. The Respondent's request for its legal fees of E£1,200,000 is **denied.**

232.3. The Claimant's payment of E£58,000 for the fees of the arbitration and my fees as arbitrator are to be **reimbursed in full** by the Respondent.

233. As such, the Respondent is ordered to pay the Claimant the sum of E£408,000 in costs, being its legal fees plus Claimant's reimbursement.

DISPOSAL

234. For all of the reasons herein contained:

235. I declare that:

235.1. **IPCs 5-8 remain payable, and cannot be covered by the Advance Payment, which has been consumed to the benefit of the Respondent**.

235.2. **The Claimant rightfully undertook works on Tank Room No. 8 in mitigation of losses caused by the Respondent's multiple breaches**.

236. I order that the Respondent shall pay the Claimant the sums of:

236.1. **E£3,000,000** for unpaid IPCs 5-8

236.2. **E£1,500,000** for works to Tank Room No. 8

236.3. **E£13,371.015** in pre-award interest in respect of Unpaid IPCs and Tank Room No. 8

236.4. **E£58.60** in pre-award interest in respect of costs

236.5. **E£350,000** in costs for the Claimant's legal fees

236.6. **E£58,000** in costs for the fees of the arbitration and the fees of the arbitrator

236.7. **Therefore, a total of E£4,921,429.62 is payable by the Respondent to the Claimant**

237. I award a grace period for the Respondent to pay the above sums of 14 days from the date of this award, being 14 June 2022, during which period no interest shall run.

238. However, should the Respondent fail to settle this Award by 5 PM Central Easthead time 28 June 2022, I order that **non-compliance interest** will run up to the date of payment at a rate of:

238.1. 2 * SONIA rate compound interest calculated daily:

238.1.1. On the unpaid IPC amount of **E£3,000,000**

238.1.2. On the Tank Room No. 8 works amount of **E£1,500,000**

238.1.3. **Therefore, non-compliance interest, calculated as 2 * SONIA rate, calculated daily, will run on the principal amount of E£4,500,000, in the event of non-payment by 5 PM on 28 June 2022**.

238.2. 8% simple interest calculated daily:

238.2.1. On Claimant's legal costs of **E£350,000**

238.2.2. On costs for fees of the arbitration and fees of the arbitrator of **E£58,000**

238.2.3. **Therefore, non-compliance interest, calculated based on simple interest of 8%, calculated daily, will run on the principal amount of E£408,000, in the event of non-payment by 5 PM on 28 June 2022**.

THE EXECUTIVE SUMMARY

239. **In summary, the Respondent is ordered to pay the Claimant the sum of E£4,921,429.62 on or before 5 PM Central Easthead Time on 28 June 2022**.

240. **If the Claimant fails to make this payment on time, it is ordered to pay the Award amount of E£4,921,429.62 plus 2 * SONIA rate on the principal amount of E£4,500,000 calculated daily, plus 8% simple interest calculated daily, to the date of payment**.

By my hand, this Award, made this day of 14 June 2022 in the seat of arbitration, Easthead,

Dr Dara Ngambi,
Arbitrator.

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NOTES TO EXAMINER

Variation Procedure

Clause 13.3 appears to contain an error: "*Upon instructing or approving a variation, the Engineer shall proceed in accordance with Sub-Clause 3.5 [Determinations] to agree…*"

I assume that this should be "Sub-Clause 4.4 [Determinations]".

Law governing the arbitration agreement

This is easily the most infuriating element of this exam, as the Exam Papers have not spelt out the law governing the arbitration agreement, merely the seat. They have alluded to the UNCITRAL Law and UNCITRAL Rules, but have not explained how they are incorporated into domestic law. This contrasts heavily with the tutorial paper and the old exam paper.

I have no idea what the significance of the statement, "*Easthead and Westland enjoy a very close statutory relationship,*" is.

I have made an argument that the law of Easthead applies to the arbitration agreement and thus the proceedings based on the seat of the arbitration. However, I have not been presented with the ***name of arbitration statute of Easthead***. This makes it difficult even to write the header, and following convention, I have simply rendered it as an "ad hoc" arbitration.

Part of my motivation for making this conclusion is admittedly an understanding that this exam does not simply seek to test my knowledge of jurisdiction and seat theory.

Expert Testimony Agreement and Order for Directions No. 1

The Stage 1 Paper included a list of matters agreed to by the Parties. It is only in the Defendant's Defence and Counterclaim at [3] that it asserted a right to put forward expert testimony.

The Stage 2 Paper states, "*The Parties agreed during the Preliminary meeting that they would each appoint an expert.*" This simply is not established on the record of Stage 1.

Article 19(1) of the Model Law provides, "*Subject to the provisions of this Law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings.*"

No objection has been made by either party as to the introduction of expert evidence by its counterpart, and it can safely be assumed that an agreement has been reached as to the introduction of expert testimony. However, when this agreement occurred is ambiguous on the record. I have stated in the Award that this issue was dealt with at the Preliminary Meeting.

Furthermore, it should be noted that no copy of Order for Directions No. 1 has been provided. Stage 1 states, "*I issued Order for Directions No. 1 the same day reflecting the above matters and also ordering costs in the arbitration as per the agreement of the parties.*"

Inferring from the discussion as to expert testimony, I have inferred that Order for Directions No. 1 included an agreement to allow the parties to adduce expert testimony.

It is my sincere hope that I am not penalized for making these inferences, as an ambiguity was created by the exam papers.

Should it not be the case that this agreement was not made at the Preliminary Hearing but at some later stage, the Award would be modified *mutatis mutandis* to reflect when the agreement and relevant procedural order were made.

Appointing Authority

The UNCITRAL Rules provide for the authority of appointing authorities to appoint arbitrator(s) in cases heard under the UNCITRAL Rules. Article 6(1) of the UNCITRAL Rules provides, "*Unless the parties have already agreed on the choice of an appointing authority…*" This statement allowed parties to agree to an appointing authority.

The UNCITRAL Rules provide at Article 8(1), "*If the parties have agreed that a sole arbitrator is to be appointed and if within 30 days after receipt by all other parties of a proposal for the appointment of a sole arbitrator the parties have not reached agreement thereon, a sole arbitrator shall, at the request of a party, be appointed by the appointing authority.*"

The present case appears to fall within Article 8(1). The Arbitration Clause states, "*A sole arbitrator will be appointed by the Easthead Arbitration Institute, (EAI), in its capacity as appointing authority.*" This uses (apparently) mandatory language – "*will*" – but qualifies that with "*in its capacity as appointing authority.*" The Parties had already agreed that a sole arbitrator was to be appointed by virtue of the other parts of the Arbitration Clause. Arguably, then, Article 8(1) applies.

If it does, the Claimant and the EAI have not complied with it, and arguably the Tribunal lacks jurisdiction.

However, against this must be said: (1) The Respondent has not raised this as a challenge to jurisdiction, which constitutes waiver under Article 4 of the UNCITRAL Model Law; and (2) If jurisdiction fails on this basis, it only fails temporarily; the Claimant will then seek to comply with the requirements of Article 8(1), prompting the EAI to comply with the requirements of Article 8(1). The result will simply be a procedural delay of one month. In the interests of economy, an arbitrator would arguably be justified in asserting her jurisdiction despite this apparent, unargued concern.

Further, pursuant to the arbitrator's *Kompetenz-Kompetenz*, the arrogation by the EAI unto itself of its power to correct its records is of no concern. It is for the arbitrator to determine the validity of her appointment by the appointing authority, not for the appointment authority to undermine it with administrative procedures.

New Evidence

In Stage 2, page 4, the Exam Paper states "*because the document was obtained without the permission of the Claimant. The Respondent countered this by saying that the Claimant gave them this flash drive and did not supervise them or give nay instruction as to its use. Furthermore, any allegation of criminality is outside the remit of the arbitrator.*" I must assume that these sentences misidentify the Parties, as the rest of this section states that it is the Claimant who discovered the document.

HORIZONS&CO الآفاق ومشاركوه

TO: China State Construction Engineering Corporation ME LLC
E-mail: antonina_slukina@chinaconstruction.ae

FROM: Horizons & Co Law Firm

DATE: 7 October 2021

SUBJECT: Legal Opinion: Non-Payment of Interim Payment Certificates.

Introduction

1. We refer to the Contract between China State Construction Engineering Corporation ME LLC and Ajman Holding LLC. Unless otherwise defined in this letter, terms and expressions defined in the Contract have the same meanings when used in this letter.
2. Items of particular note are **highlighted in bold.**
3. This letter is provided pursuant to the engagement between China State and Horizons & Co.
4. The provision of this opinion is not to be taken as implying that we owe a duty of care to anyone other than our client, in relation to the content of, and the commercial and financial implications of, the Contract Document, Mirkaaz Mall, Ajman, UAE, Main Works Package, dated 8 January 2018 (the "**Contract**"). This advice is provided solely for the benefit of the Client and for no other person or entity.
5. This letter sets out our opinion on certain matters of UAE law and contractual interpretation as currently applied by the courts of the UAE. We express no opinion on the law of any other jurisdiction. We have not made any investigation of, and do not express any opinion on, any other law.
6. For the purposes of this letter, we have examined:

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a. The Contract signed between Ajman Holding LLC ("**the Employer**") and China State Construction Engineering Corporation LLC ("**China State**", "**the Contractor**") on 8 January 2018.
b. Correspondence provided by China State on 29 September 2021 between China State, Ajman Holding LLC, and Funtastic Engineering Consultancy LLC, between February 2021 and September 2021.

Executive Summary

7. The Contractor arguably has a strong case in regards to the unpaid IPCs, as these have been acknowledged by the Employer as owing; these IPCs have been certified by the Engineer; and they have not in fact been paid. Furthermore, there does not appear to be a dispute as to this debt owed by the Employer.
8. The Contractor also arguably has a strong case in regards to financing charges. Financing charges appear to arise as a primary liability by way of contractual machinery, but out of an abundance of caution, the Contractor should also provide notice to the Engineer of these charges.
9. The Contractor appears to have effected a reduction in the rate of progress in the Works, factually since 22 April 2021 and effective under the Contract as of 10 May 2021. The Contractor appears to be exposed to liability for its reduction during the 18-day period between these two dates, when it was arguably non-compliant with the Contract for having reduced its rate of progress improperly.
10. The Contractor appears to have effected suspension of works on either 19 September 2021 or 26 September 2021. The Contractor factually suspended works on 1 September 2021. The Contractor appears to be exposed to liability for its suspension of works for either the 18-day or 25-day period between these dates, when it was arguably non-compliant with the Contract for having suspended work improperly.
11. Because of these periods of noncompliance, the Contractor faces exposure for giving inadequate notice under the Contract.
12. The email sent by Li Donghai on 17 August 2021 mentions, "*Agreed by Ajman Holding, CSCEC replaced it performance bond with security cheque*". Horizons & Co. do not have any further

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information regarding this matter, and if it is of concern to the Client, we encourage the client to provide further instructions.

13. The Contractor appears to have a good claim to bring before an arbitral tribunal. The Contractor must follow the contractually mandated procedure in bringing its claim before a tribunal. It is required (1) to send a Notice of Dispute to the Employer; and (2) to attempt amicable settlement with the Employer for a period of 14 days; and (3) only thereafter may it bring a claim. It is likely that the DIFC-LCIA Rules will apply to this arbitration, as prescribed by the contract. However, the government of Dubai has recently enacted Decree No. 34 of 2021, which may impose DIAC Rules on this arbitration in the future. The Contractor must be sensitive to time, that if it wishes to bring a claim under DIFC-LCIA Rules, it must do so before the new DIAC Rules are promulgated; this Opinion expresses no opinion as to which set of rules would be preferable, as the new DIAC Rules have not yet been promulgated or thus evaluated.
14. The Employer is arguably in breach of its obligations under Clause 2.4 (reasonable evidence regarding financing) and Clause 14.7 (payment of IPCs). The Contractor is arguably entitled to terminate its Contract with the Employer pursuant to Clause 16.2 of its Contract with the Employer in light of these breaches. The Contractor is also entitled to terminate its Contract under general principles of UAE law. The Contractor must give 14 days' notice to the Employer if it intends to terminate the Contract.

Opinion – Issue 1 – Reduction in Performance

Clause 16.1 – Contractor's Entitlement to Suspend Work
If the Engineer fails to certify in accordance with Sub-Clause 14.6 [*Issue of Interim Payment Certificates*] or the Employer fails to comply with Sub-Clause 2.4 [*Employer's Financial Arrangements*] or Sub-Clause 14.7 [*Payment*], **the Contractor may, after giving not less than 21 days' notice to the Employer, suspend work (or reduce the rate of work) unless and until the Contractor has received the Payment Certificate, reasonable evidence or payment**, as the case may be and as described in the notice.

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The Contractor's action shall not prejudice his entitlements to financing charges under Sub-Clause 14.8 [Delayed Payment] and to termination under Sub-Clause 16.2 [*Termination by Contractor*].

If the Contractor subsequently receives such Payment Certificate, evidence or payment (as described in the relevant Sub-Clause and in the above notice) before giving a notice of termination, the Contractor shall resume normal working as soon as is reasonably practicable.

If the Contractor suffers delay and/or incurs Cost as a result of suspending work (or reducing the rate of work) in accordance with this Sub-Clause, the Contractor shall give notice to the Engineer and shall be entitled subject to Sub-Clause 20.1 [*Contractor's Claims*] to:

(a) an extension of time for any such delay, if completion is or will be delayed. under Sub-Clause 8.4 [*Extension of Time for Completion*]; and

(b) payment of any such Cost, plus reasonable profit, which shall be included in the Contract Price.

After receiving this notice, the Engineer shall proceed in accordance with Sub-Clause 3.5 [*Determinations*] to agree or determine these matters.

15. The FIDIC contractual provisions cited above, a 21-day notice period is required before the Contractor can reduce its rate of work, unless it has received the Payment Certificate, reasonable evidence, or payment.
16. Although the Contract gives rise to an entitlement to reduce the rate of works and/or to suspend works, the present case evinces ambiguity as to whether reduction of rate of performance was properly effected. In particular, it is ambiguous and possibly unlikely that the Contractor gave the Employer proper notice as to its intention to reduce its rate of performance.
    a. The Contractor's email on 28 March 2021 reminded the Employer of its obligations under IPC #36, but did not announce the Contractor's intention to reduce the rate of performance.

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b. The Contractor's letter to the Employer on 4 April 2021 stated that the payment was overdue, and that the Contractor would not be responsible for delay due to this pursuant to Clauses 8.4 (EOT) and 16.1 (quoted above). However, although no formality requirement is present in the Contract, this letter did not carry the appearance or announcement of a notice, and was ambiguous in its intended effect. Disclaiming responsibility is readily distinguished from evincing an intention to reduce the rate of progress on works.

c. The Employer's email to the Contractor on 5 April 2021 appears to interpret the 4 April 2021 letter to the Employer as notice pursuant to Clause 16.1, stating that the non-payment of IPC #36 four days earlier had not met the contractual requirement of 21 days. It must be noted that this point was not, in the documents provided to Horizons & Co., specifically addressed by the Contractor in subsequent correspondence.

d. The Contractor's email to Horizons & Co. dated 4 October 2021 indicates the Contractor was and is under the belief that it had effect a reduction of the rate of progress on 22 April 2021, i.e., 21 days from 1 April, the date that IPC #36 had not been paid. Although the Employer, in its email on 5 April 2021, appears to acknowledge that a reduction would have been permissible at the date of 22 April 2021, it does not appear that notice itself was effected on 1 April.

e. The Contractor's letter to the Employer on 19 April 2021 indicates an intention to reduce the rate of work from 22 April 2021. This letter therefore did not effect notice of 21 days effective 22 April 2021. However, the language of this letter states that it was "*hereby notifying*" that the rate of works would be reduced from 22 April 2021. 21 days from 19 April 2021 was 10 May 2021. **By notifying on 19 April 2021, and factually reducing works from 22 April 2021, it is arguable that the Contractor was in breach of contract for 18 days, and that the Contractor legitimately has reduced works from 10 May 2021 onwards.**

f. The Contractor's letter dated 29 April 2021 contains language from which an inference of a reduction can readily be made. The Employer was at this point arguably on notice that the reduction had taken place. In its letter dated 1 June 2021, the Contractor used

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language indicating the existence of a reduction ("*albeit at a reduced rate*"). Similarly, in its letter to the Employer dated 5 August 2021, the Contractor used language indicating the existence of a reduction ("*may continue the work at a reduced rate of works…"*).

17. It is therefore arguable that the Contractor has factually reduced works since 22 April 2021, was in breach of contract from 22 April 2021 to 9 May 2021, and has reduced works in a manner sanctioned by the Contract since 10 May 2021. **This creates exposure for the Contractor for this period of breach**.

Opinion – Issue 2 – Alternative Payment Arrangements

Clause 2.4 – Employer's Financial Arrangements
The Employer shall submit, within 28 days after receiving any request from the Contractor, reasonable evidence that financial arrangements have been made and are being maintained which will enable the Employer to pay the Contract Price (as estimated at that time) in accordance with Clause 14 [Contract Price and Payment]. If the Employer intends to make any material change to his financial arrangements, the Employer shall give notice to the Contractor with detailed particulars.

18. Pursuant to Clause 2.4 of the Contract, the Employer had a duty to provide the Contractor reasonable evidence of its financial arrangements. The purpose of this clause is to ensure that the Contractor would be able to arrange its own financial affairs with a reasonable assurance as to future payments to be received from the Employer.
19. On 5 April 2021, the Employer indicated that "*payment of IPC 36 is under process and to be released shortly*," which indicates at most a then-current intention to release payment to the Contractor.
20. On 27 May 2021, the Contractor requested from the Employer reasonable evidence of a financial arrangement, pursuant to Sub-Clause 2.4 of the General Conditions of the Contract.

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21. On 13 June 2021, the Employer wrote an email to the Contractor stating that, "*our tentative payment plan is… payment to bill no 36, 37, & 38 will be settled by the end of June*". It also stated that its discussions with its bank "*whilst very well advanced and positive, will only be finalized this coming week pending a final executive management meeting and we will keep you posted if there is any changes in the above mentioned plan*."
22. The Contractor wrote to the Employer on 23 June 2021 repeating the sentence (without context) "*Payment to bill no 36, 37, & 38 will be settled by the end of June.*" Then the Contractor stated that based on this promise, the Contractor had committed to the plans of its subcontractors and suppliers.
23. Finally, on 17 August 2021, the Contractor wrote to the Employer, mentioning a meeting that took place on 4 July 2021 and memorializing the discussion that took place at the meeting held on 11 August 2021. At this meeting, the Parties discussed new negotiations regarding project finance with CBD, a bank; discussions with "His Highness" regarding funding; the release of a payment of between AED 3 and 5 million; and supply chain disruptions due to lack of payment
24. Analysis of this can go two ways:
    a. First, it is clear that the Employer was under a duty under Clause 2.4 to provide the Contractor assurances of its financial health by way of reasonable evidence. No evidence has been provided that the Employer performed that duty. Furthermore, the Employer repeatedly assured the Contractor of its ability and willingness to pay monies owed, and indeed apparently induced the Contractor to rely on these assurances. This indicates that the assurances provided to the Contractor were at least to some extent convincing, whether or not they were reasonable. **In either interpretation, the Employer breached its duty under Clause 2.4: either it simply failed to provide reasonable evidence, or it provided evidence that was not reasonable**.
    b. Second, it is conceivable that the assurances made by the Employer supplemented the provisions of the Contract, or created a separate contract. In this regard, it must first be noted that such an agreement would still be covered by the arbitration clause under Clause 20.2 ("*arising out of or in connection with*"). Furthermore, it must be noted that the parameters of such an agreement are poorly defined on the record as provided to

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Horizons & Co. The Employer's letter dated 5 April 2021 indicates nothing more than a present intention, not an intention to form a new agreement. In particular, the precatory and outright aspirational language used by the Employer in its 13 June 2021 email must be noted. The record, such as it is, of the 11 August 2021 meeting again indicates aspiration, rather than any conclusive agreement. That the Contractor chose at this stage to rely on these assurances is unfortunate, but **it is unlikely that a separate, collateral agreement will be found without further, and considerably more substantial, evidence. Horizons & Co. therefore require further instruction in order to provide fuller advice, and China State are encouraged to provide as much documentation in regards to these events as possible. At the very least, this was an acknowledgment of debt by the Employer.**

Opinion – Issue 3 – Suspension of Works

Clause 16.1 – Contractor's Entitlement to Suspend Work
If the Engineer fails to certify in accordance with Sub-Clause 14.6 [*Issue of Interim Payment Certificates*] or the Employer fails to comply with Sub-Clause 2.4 [*Employer's Financial Arrangements*] or Sub-Clause 14.7 [*Payment*], **the Contractor may, after giving not less than 21 days' notice to the Employer, suspend work (or reduce the rate of work) unless and until the Contractor has received the Payment Certificate, reasonable evidence or payment**, as the case may be and as described in the notice. The Contractor's action shall not prejudice his entitlements to financing charges under Sub-Clause 14.8 [*Delayed Payment*] and to termination under Sub-Clause 16.2 [*Termination by Contractor*]. If the Contractor subsequently receives such Payment Certificate, evidence or payment (as described in the relevant Sub-Clause and in the above notice) before giving a notice of termination, the Contractor shall resume normal working as soon as is reasonably practicable.

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If the Contractor suffers delay and/or incurs Cost as a result of suspending work (or reducing the rate of work) in accordance with this Sub-Clause, the Contractor shall give notice to the Engineer and shall be entitled subject to Sub-Clause 20.1 [*Contractor's Claims*] to: (a) an extension of time for any such delay, if completion is or will be delayed. under Sub-Clause 8.4 [*Extension of Time for Completion*]; and (b) payment of any such Cost, plus reasonable profit, which shall be included in the Contract Price. After receiving this notice, the Engineer shall proceed in accordance with Sub-Clause 3.5 [*Determinations*] to agree or determine these matters.

25. Clause 16.1 is repeated in full.
26. Analysis of suspension of works under the Contract is similar to that in regards to reduction of works. 21 days' notice was required to effect suspension of work under the contract, unless the Payment certificate, reasonable evidence, or payment were received.
27. UAE law also provides strong protection to contractors who suspend work for non-payment of claims:

UAE Civil Code, Article 247
In contracts binding upon both parties, if the mutual obligations are due for performance, each of the parties may refuse to perform his obligation if the other contracting party does not perform that which he is obliged to do.

28. As a matter of general principle, a failure by one party to perform its part of a mutual obligation releases the other from any corresponding obligation. The Dubai Cassation, Case No. 90/1995 dated 5 November 1995, found:

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> *"It is established in binding agreements that each party may, if corresponding obligations are outstanding, decline to perform its obligations if the other party fails to perform its obligation. This means that a purchaser may withhold the purchase price even if it was due and payable, until the seller has performed the corresponding obligation, unless the purchaser has waived such right after it accrued or if the contract contains a provision preventing the purchaser from applying such right."*

29. In its 4 April 2021 letter, the Contractor stated that it would not be responsible for suspension of performance. Such did not effect suspension of the Works. This was stated in the Employer's correspondence of 5 April 2021, in which the Employer reiterated the provisions of Clause 16.1 and the 21-day notice requirement.
30. In its letter dated 1 June 2021, the Contractor used language indicating the prospect of a suspension ("*Under these worsening circumstances the Contract is required under the contracts terms sub clause 16.1 to notify the Employer that after 21 days suspension of the works may be necessary should overdue payment not be received*."). On 27 June 2021, the Contractor sent a letter to the Employer stating that it "*must consider actions available as stipulated under the Conditions of Contract Sub-Clause 16.1…*" On 5 August 2021, the Contractor wrote to the Employer stating it "*may suspend the works…*" None of these effected the suspension of contract works.
31. On 30 August 2021, the Contractor sent a letter to the Employer in which it stated that it "*regretfully have no other choice but to suspend the Work per Ref: CSCECME/MM/PD-AH/2021/065 in accordance with Sub-Clause 16.1 of the Conditions of Contract. The suspension of works will start from 01st September 2021*." The earlier letter cited has not been provided to Horizons & Co.
32. On 6 September 2021, the Contractor sent the Employer a letter that stated they "*hereby inform that the Work is suspended effective from 1st September 2021 in accordance with Sub-Clause 16.1 of the Conditions of Contract*."
33. The following analysis proceeds ignoring the earlier letter, which is requested from the Contractor's representatives.

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34. No formality requirements are found in the (modified) FIDIC contract that forms the basis of the Parties' Contract. No guidance in relation to the 1999 FIDIC contract implies any formality. UAE law does not provide for formality in regards to the suspension of construction works or anything similar (e.g., Arts 19, 146(2), 193, 210, 471). Finally, the rules of the DIFC-LCIA do not require formality in this regard.
35. It is therefore arguable that the Contractor effected notification of suspension on 30 August, and thus was validly suspending works on 20 September 2021. **If this is the case, the Contractor was non-compliant with the Contract for 19 days, from 1 September 2021 to 19 September 2021.**
36. In the event that the words, "*hereby inform*" carry special weight, then the Contractor effected notification of suspension on 6 September 2021, and was validly suspending works on 27 September 2021. **If this is the case, the Contractor was non-compliant with the Contract for 26 days, from 1 September 2021 to 26 September 2021**.
37. **It is therefore arguable that the Contractor validly suspended works, but in both scenarios documented to Horizons & Co., the Contractor was non-compliant with the Contract for a period of time. This creates exposure for the Contractor**.

Opinion – Issue 4 – Claim for Unpaid Interim Payment Certificates

Clause 14.3 – Application for Interim Payment Certificates
The Contractor shall submit a Statement in six copies to the Engineer after the end of each month, in a form approved by the Engineer, showing in detail the amounts to which the Contractor considers himself to be entitled, together with supporting documents which shall include the report on the progress during this month in accordance with Sub-Clause 4.21 [*Progress Reports*]. The Statement shall include the following items, as applicable, which shall be expressed in the various currencies in which the Contract Price is payable, in the sequence listed:

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1. The estimated contract value of the Works executed and the Contractor's Documents produced up to the end of the month (including the Variations but excluding items described in sub-paragraphs (b) to (g) below);

2. Any amounts to be added and deducted for changes in legislation and changes in cost, in accordance with Sub-Clause 13.7 [*Adjustments for Changes in Legislation*] and Sub-Clause 13.8 [*Adjustments for Changes in Cost*];

3. Any amount to be deducted for retention, calculated by applying the percentage of retention stated in the Appendix to Tender to the total of the above amounts, until the amount so retained by the Employer reaches the limit of Retention Money (if any) stated in the Appendix to Tender;

4. Any amounts to be added and deducted for the advance payment and repayments in accordance with Sub-Clause 14.2 [*Advance Payment*];

5. Any amounts to be added or deducted for Plant and Materials in accordance with Sub-Clause 14.5 [*Plan and Materials intended for the Works*];

6. Any other additions or deductions which may have become due under the Contract or otherwise, including those under Clause 20 [*Claims, Disputes and Arbitration*]; and

7. The deduction of amounts certified in all previous Payment Certificates.

Clause 14.6 – Issue of Interim Payment Certificates
No amount will be certified or paid until the Employer has received and approved the Performance Security. Thereafter, the Engineer shall, within 28 days after receiving a Statement and supporting documents, issue to the Employer an Interim Payment Certificate which shall state the amount which the Engineer fairly determines to be due, with supporting particulars.

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However, prior to issuing the Taking-Over Certificate for the Works, the Engineer shall not be bound to issue an Interim Payment Certificate in an amount which would (after retention and other deductions) be less than the minimum amount of Interim Payment Certificates (if any) stated in the Appendix to Tender. In this event, the Engineer shall give notice to the Contractor accordingly.

An Interim Payment Certificate shall not be withheld for any other reason, although:

(a) If any thing supplied or work done by the Contractor is not in accordance with the Contract, the cost of rectification or replacement may be withheld until rectification or replacement has been completed; and/or

(b) If the Contractor was or is failing to perform any work or obligation in accordance with the Contract, and had been so notified by the Engineer, the value of this work or obligation may be withheld until the work or obligation has been performed.

The Engineer may in any Payment Certificate make any correction or modification that should properly be made to any previous Payment Certificate. A Payment Certificate shall not be deemed to indicate the Engineer's acceptance, approval, consent, or satisfaction.

Clause 14.7 – Payment (as amended)

The Employer shall pay to the Contractor:

(a) the first instalment of the advance payment within 42 days after issuing the Letter of Acceptance or within 21 days after receiving the documents in accordance with Sub-Clause 4.2 [*Performance Security*] and Sub-Clause 14.2 [*Advance Payment*]. whichever is later;

(b) [*The employer shall pay the Contractor, the amount certified in each Interim Payment Certificate within 30 days after certification*]; and

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(c) the amount certified in the Final Payment Certificate within 56 days after the employer received the employment certificate.

Payment of the amount due in each currency shall be made into the bank account, nominated by the Contractor. in the payment country (for this currency) specified in the Contract.

38. The position under UAE law in regards to payment certificates is straightforward. Ordinarily, a claimant has the burden of proving the existence of a debt, and thereafter the burden shifts to a defendant to prove that the debt has been discharged. However, there is a presumption that payment is due in respect of an amount included in a payment certificate issued by a consultant. (Dubai Cassation No. 167/1998 dated 6 June 1998.) A contractor is not similarly bound by a consultant's certificate. (Abu Dhabi Cassation Nos. 43, 78 and 161/4 dated 31 March 2010).
39. In the present case, the Engineer has certified Interim Payment Certificates 36-42 in the schedule below.
    a. Interim Payment Certificate #36 including VAT due 1 April 2021 AED 9,704063.07
    b. Interim Payment Certificate #37 including VAT due 1 May 2021 AED 7,057,910.06
    c. Interim Payment Certificate #38 including VAT due 2 June 2021 AED 7,537,702.69
    d. Interim Payment Certificate #39 including VAT due 2 July 2021 AED 4,181,788.85
    e. Interim Payment Certificate #40 including VAT due 1 August 2021 AED 2,254,859.65
    f. Interim Payment Certificate #41 including VAT due 1 Sept 2021 AED 2,372,200.78.
    g. Interim Payment Certificate #42 including VAT due 1 Oct 2021 AED 2,396,232.70.
40. The Client is requested to confirm these figures, and confirm that IPCs #41 and #42 have been certified.
41. In subsequent correspondence, it appears that the Employer has acknowledged its debt to the Contractor. On 5 April 2021, the Employer wrote to the Contractor and stated that IPC #36 was being processed for payment. On 13 June 2021, the Employer wrote to the Contractor, discussing a "*tentative payment plan*" and "*payment to bill no 36, 37, & 38 will be settled by the end of June.*" Whether or not these statements create new or collateral contractual relations (discussed *supra*) does not affect their character as acknowledgement of debt.

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42. **No evidence has been presented to Horizons & Co. to rebut the presumption in favour of the Contractor. It is unknown what evidence would be capable of rebutting this presumption. The fact that these debts have been certified by way of Interim Payment Certificate appears to indicate that the Employer has acknowledged these IPCs as debts. The Employer's own statements appear to acknowledge its debts. That the Contractor is owed these sums of money appears to be proven strongly. Therefore, this issue does not appear to be in dispute; rather, it is the non-payment of these debts that is the principal source of dispute in the present case.**
43. An arbitral tribunal would be well positioned to dispose of this issue.

Opinion – Issue 5 – Claim for Financing Charges

Clause 14.8 – Delayed Payment
If the Contractor does not receive payment in accordance with Sub-Clause 14.7 [*Payment*], the Contractor shall be entitled to receive financing charges compounded monthly on the amount unpaid during the period of delay. This period shall be deemed to commence on the date for payment specified in Sub-Clause 14.7 [*Payment*], irrespective (in the case of its sub-paragraph (b) of the date on which any Interim Payment Certificate is issued. Unless otherwise stated in the Particular Conditions, these financing charges shall be calculated at the annual rate of three percentage points above the discount rate of the central bank in the country of the currency of payment, and shall be paid in such currency. The Contractor **shall be entitled to this payment without formal notice or certification,** and without prejudice to any other right or remedy.

44. It is clear that Clause 14.8 provides an *express contractual entitlement* to financing charges. Such award, if valid, is not at the discretion of an arbitral tribunal.
45. It is the understanding of Horizons & Co that FIDIC Clause 14.8 does not of fend Islamic principles or is not in the UAE adjudged so to do; rather, interest is permitted on the basis that it represents

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compensation for "*presumed*" damage for delaying payment in breach of an obligation (Federal Supreme Court No. 371/18 dated 30 June 1998, 332/21 dated 25 September 2001 and 371/21 dated 24 June 2001).

46. Furthermore, as Clause 14.8 provides an express contractual entitlement to financing charges, it is submitted that such entitlement is not in the way of damages or extracontractual or ancillary or additional charges. **As such, it is arguable that the financing charges for delayed payment under Clause 14.8 do *not* fall under Clause 20.1**.

Opinion – Issue 6 – Claims

Clause 20.1 – Contractor's Claims
If the Contractor considers himself to be entitled to any extension of the Time for Completion **and/or any additional payment**, under any Clause of these Conditions or otherwise in connection with the Contract, the Contractor shall give notice to the Engineer, describing the event or circumstance giving rise to the claim. The notice shall be given as soon as practicable, and not later than [14] days after the Contractor became aware, or should have become aware. of the event or circumstance. If the Contractor fails to give notice of a claim within such period of [14] days, the Time for Completion shall not be extended, the Contractor shall not be entitled to additional payment, and the Employer shall be discharged from all liability in connection with the claim. Otherwise, the following provisions of this Sub-Clause shall apply. The Contractor shall also submit any other notices which are required by the Contract, and supporting particulars for the claim, all as relevant to such event or circumstance. The Contractor shall keep such contemporary records as may be necessary to substantiate any claim. either on the Site or at another location acceptable to the Engineer. Without admitting the Employer's liability, the Engineer may, after receiving any notice under this Sub-Clause, monitor the record-keeping and/or instruct the Contractor to keep further contemporary

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records. The Contractor shall permit the Engineer to inspect all these records. and shall (if instructed) submit copies to the Engineer.

Within 42 days after the Contractor became aware (or should have become aware) of the event or circumstance giving rise to the claim. or within such other period as may be proposed by the Contractor and approved by the Engineer. the Contractor shall send to the Engineer a fully detailed claim which includes full supporting particulars of the basis of the claim and of the extension of time and/or additional payment claimed. If the event or circumstance giving rise to the claim has a continuing effect:

a) this fully detailed claim shall be considered as interim:

b) the Contractor shall send further interim claims at monthly intervals, giving the accumulated delay and/or amount claimed. and such further particulars as the Engineer may reasonably require: and

c) the Contractor shall send a final claim within 28 days after the end of the effects resulting from the event or circumstance. or within such other period as may be proposed by the Contractor and approved by the Engineer.

Within 42 days after receiving a claim or any further particulars supporting a previous claim, or within such other period as may be proposed by the Engineer and approved by the Contractor, the Engineer shall respond with approval, or with disapproval and detailed comments. He may also request any necessary further particulars, but shall nevertheless give his response on the principles of the claim within such time.

Each Payment Certificate shall include such amounts for any claim as have been reasonably substantiated as due under the relevant provision of the Contract. Unless and until the particulars supplied are sufficient to substantiate the whole of the claim, the Contractor shall only be entitled to payment for such part of the claim as he has been able to substantiate.

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> The Engineer shall proceed in accordance with Sub-Clause 3.5 [*Determinations*] to agree or determine (i) the extension (if any) of the Time for Completion (before or after its expiry) in accordance with Sub-Clause 8.4 [*Extension of Time for Completion*] and/or (ii) the additional payment (if any) to which the failure has prevented or prejudiced proper investigation of the claim, unless the claim is excluded under the second paragraph of this Sub-Clause.

47. There is a tension between Clause 14.8 and Clause 20.1 in that Clause 20.1 due to the presence of the words "*and/or any additional payment*" in Clause 20.1.
48. It is conceivable that a tribunal could find that a claim under Clause 14.8 falls within Clause 20.1, as it constitutes an "*additional payment*". The processing of financing charges under Clause 14.8 is not found within Clause 14.7.
49. Against this might be said:
    a. The rule of interpretation known as *noscitur a sociis* holds that a word will be judged in its context, by reference to the words around it. The context here are the words "extension of the Time for Completion" and "event or circumstance" giving rise to the claim for EOT. Non-payment of moneys owing is an event or circumstance only in the barest manner and hardly requires evaluation by an Engineer.
    b. The word "*additional*" implies that the payment is in addition to something, presumably the sums due under the contract, just as an extension of time is an extension of time due under the contract.
    c. Clause 14.8 states, "***The Contractor shall be entitled to this payment without formal notice or certification,*** *and without prejudice to any other right or remedy*." The provisions of Clause 20.1 explicitly envision formal notice, e.g., "*the Contractor shall give notice to the Engineer, describing the event or circumstance giving rise to the claim*"; "*the Engineer may, after receiving any notice under this Sub-Clause*..."; etc. These provisions would appear to defeat the explicit language of Clause 14.8 if payment under Clause 14.8 had to be noticed to the Engineer.

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50. It is therefore arguable that the Contractor need not make an application or file notice with the Engineer in regards to any claim under Clause 14.8 for financing charges. However, the Contractor is advised to make such a claim out of an abundance of caution, if the Contractor's finances permit as such.

Opinion – Issue 7 – Arbitration and Jurisdiction

Clause 20.2 (inserted by Particular Conditions) – Arbitration
Any dispute or difference arising out of or in connection with this agreement including any question regarding its existence, validity, or termination, shall be firstly settled amicably within 14 days from the date of the dispute being notified in writing by either party, unless settled amicably, the dispute shall be finally resolved by arbitration under the Arbitration rules of the DIFC-LCIA arbitration centre which rules are deemed to be incorporated by reference to this clause. The number of arbitrators shall be three. The seat or legal place of arbitration shall be Dubai International Financial Centre, Dubai, UAE. The language used in the arbitration shall be English.

51. This arbitration clause is straightforward.
52. First, the breadth of its jurisdiction must be noted: "*any dispute or difference arising out of or in connection with this agreement*". This jurisdiction includes the possible matter of a side or collateral agreement that has arisen in regards to assurances made by the Employer in regards to its financing arrangements in May, June, and August 2021.
53. This arbitration clause contains the standard elements of an arbitration clause:
    a. The arbitration will likely be resolved under the arbitration rules of the DIFC-LCIA. Decree No. 34 of 2021, which abolishes the DIFC-LCIA Arbitration Centre and amalgamates it into the DIAC, has introduced uncertainty in regards to the rules that apply to arbitrations. In regards to existing arbitrations, the rules chosen will continue unaffected; however, in regards to new arbitrations, DIAC Rules will apply. It is a general principle of arbitration

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law that the parties are able to choose their own rules, and it appears that the Parties in the present case have already elected to use DIFC-LCIA Rules, which will continue to exist as a historical document; however, arbitration in the present case has not yet been filed. It has been announced that DIAC will soon introduce new rules reconciling it with the Decree; it is at a minimum expected that if parties file a new arbitration electing to use DIFC-LCIA Rules before the new DIAC Rules are promulgated, that election will be given effect. However, uncertainty exists as to whether parties will be allowed to elect to use DIFC-LCIA Rules after the new DIAC rules are promulgated. It is believed that the new DIAC Rules will follow UNCITRAL principles. None of this should be alarming to the client: it is unlikely that a change in rules will affect substantive outcomes; the UNCITRAL Rules are well known and trusted; and it is likely that the parties will be allowed to elect to use DIFC-LCIA Rules after the promulgation of the new DIAC Rules.

b. There shall be three arbitrators.

c. The seat of arbitration shall be the DIFC.

d. The language of the arbitration shall be English.

54. It should be noted again that the governing law of the Contract is that of the United Arab Emirates. This law will govern how the substantive terms of the Contract are interpreted.

55. Of critical note is the process by which arbitration is commenced:

a. First, the Contractor must notify the Employer of a dispute. It is by the letter provided in addition to this Opinion that the Contractor will fulfil this requirement.

b. Over the next 14 days, the Contractor must attempt to resolve the dispute amicably with the Employer. The Contractor must provide evidence in writing as to its attempts to amicably resolve its dispute as a precondition to arbitration.

c. After 14 days, the Contractor may initiate arbitration. Pursuant to Decree No. 34 of 2021, the arbitration will be administered by DIAC, seated in the DIFC.

56. Failure to follow this process may result in the Tribunal ruling that it lacks jurisdiction to hear the dispute.

57. **If the Contractor wishes to commence arbitration, it must strictly follow the process outlined above. Given that the promulgation of new DIAC Rules is expected shortly, if the Contractor**

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wishes to have its dispute heard under DIFC-LCIA rules, the Contractor faces potential exposure and is encouraged to commence this process presently.

Opinion – Issue 8 – Termination

Clause 16.2 – Termination
The Contractor shall be entitled to terminate the Contract if: (a) the Contractor does not receive the reasonable evidence within 42 days after giving notice under Sub-Clause 16.1 [*Contractor's Entitlement to Suspend Work*] in respect of **a failure to comply with Sub-Clause 2.4** [*Employer's Financial Arrangements*]; (b) the Engineer fails, within 56 days after receiving a Statement and supporting documents, to issue the relevant Payment Certificate; (c) **the Contractor does not receive the amount due under an Interim Payment Certificate within 42 days after the expiry of the time stated in Sub-Clause 14.7 [*Payment*] within which payment is to be made** (except for deductions in accordance with Sub-Clause 2.5 [*Employer's Claims*]); (d) **the Employer substantially fails to perform his obligations under the Contract**; (e) the Employer fails to comply with Sub-Clause 1.6 [*Contract Agreement*] or Sub-Clause 1.7 [*Assignment*]; (f) a prolonged suspension affects the whole of the Works as described in Sub-Clause 8.11 [*Prolonged Suspension*]; or (g) the Employer becomes bankrupt or insolvent, goes into liquidation, has a receiving or administration order made against him, compounds with his creditors, or carries on business under a receiver, trustee or manager for the benefit of his creditors, or if any

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act is done or event occurs which (under applicable Laws) has a similar effect to any of these acts or events.

In any of these events or circumstances, **the Contractor may, upon giving 14 days' notice to the Employer, terminate the Contract**. However, in the case of subparagraph (f) or (g), the Contractor may by notice terminate the Contract immediately.

The Contractor's election to terminate the Contract shall not prejudice any other rights of the Contractor, under the Contract or otherwise.

58. According to the provisions of the Contract, the Contractor may terminate the Contract upon 14 days' notice.
59. In the present case, the Contractor has multiple grounds upon which to terminate its Contract with the Employer:
60. The Employer has not provided reasonable evidence of financial arrangements, pursuant to Clause 2.4.
61. The Contractor has not received payment under IPCs 36-42 within 42 days after the expiry of the time stated in Sub-Clause 14.7.
62. The Employer has substantially failed to perform its obligations under the Contract by providing no evidence that it is capable or willing to pay the sums of money owed to the Contractor.

Civil Code – Article 271

The parties may agree that in case of non-performance of the obligations deriving from the contract, the contract will be deemed to have been "ipso facto" without need to obtain a court order. Such an agreement does not release the parties from the obligation of serving a formal notification, unless the parties agree that such notification is dispensed with.

63. Article 271 of Federal Law No. 5/1985 provides that the parties can agree for a contract to be terminated, in the event of non-performance by one of the parties, without the need to obtain

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a court order. However, Article 271 of Federal Law No. 5/1985 expressly mandates that the party claiming termination must serve formal notice, unless the parties have stipulated otherwise in their contract.

64. Article 271 confirms the Contractor's right to terminate its contract, and confirms that notice must be given to the Employer. **The Contractor must document its attempts at amicable settlement and must give the Employer 14 days' notice**.

Article 274 – Effects of Contract's Dissolution
When a contract is or shall be rescinded, the two contracting parties shall be reinstated to their former position, prior to contracting, and in case this is impossible, the Court may award damages.

65. Under UAE law, damages are available upon termination. The Contractor will have a case for damages if damages can be proved.
66. Under UAE law, it has also been held that as a construction contract is a continuing contract termination does not affect the parties' accrued rights, including the right to be paid for work performed, which are not extinguished on termination. (Abu Dhabi Cassation No. 293/3 dated 27 May 2009, Dubai Cassation No. 50/2008 dated 27 May 2008 and Federal Supreme Court No. 213/23 dated 8 June 2003.)
67. As such, termination will not affect the Contractors rights to be paid under IPC 36-42. This is provided for by both the Contract and by general principles of UAE law.
68. The Contract deals with payments and other matters after termination.

Clause 16.3 – Cessation of Work and Removal of Contractor's Equipment
After a notice of termination under Sub-Clause 15.5 [*Employer's Entitlement to Termination*], Sub Clause 16.2 [*Termination by Contractor*], or Subclause 19.6 [*Optional Termination, Payment and release*] has taken effect, the Contractor shall promptly:

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(a) Cease all further work, except for such work as may have been instructed by the Engineer for the protection of life or property or for the safety of the Works; (b) Hand over Contractor's Documents, Plant, Materials and other work, for which the Contractor has received payment, and (c) Remove all other Goods from the Site, except as necessary for safety, and leave the Site.

69. These provisions are self-explanatory and logical.

Clause 16.4 – Payment on Termination
After a notice of termination under Sub-Clause 16.2 [*Termination by Contractor*] has taken effect, the Employer shall promptly: (a) Return the Performance Security to the Contractor; (b) Pay the Contractor in accordance with Sub-Clause 19.6 [*Optional Termination, Payment and Release*], and (c) Pay the Contractor the amount of any loss of profit or other loss or damage sustained by the Contractor as a result of this termination.

70. Sub-Clause 19.6 refers to *force majeure* provisions and is not relevant.
71. Sub-Clause 16.4(c) provides a contractual claim for damages, to be read along with the legislative provisions cited above. This clause does not affect the accrued rights to payment under the IPCs discussed above.

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Options Available to Contractor

72. Based on the foregoing, we are of the opinion that the Contractor has several options open to it.
73. The Contractor should issue a formal Notice of Dispute using language that indicates such. This proposed letter accompanies this Opinion.
74. The Contractor should consider its position and note its potential exposure in regards to its earlier notice of reduction of works and its earlier notice of suspension, and this will be a major focus of any defence raised by the Employer to these claims.
75. The Contractor must follow the proper procedure in bringing a claim for arbitration including evidenced genuine efforts to solve this matter amicably for 14 days before filing a request for arbitration. This is a condition precedent to the Arbitration.
76. Possible claims in Arbitration include:
    a. Pursuant to Clause 14.7, refer the claim for breach of payment clause, i.e., the non-payment of certified sums of money from 36 to 42. We have identified the issue surrounding inadequate notice of the reduction of works in the letter of 19 April 2021 but can make an argument that notice was effective 21 days from the 19th April 2021. We could attempt to make an argument that notice was not necessary due to knowledge by the Employer of the hardship caused to the Contractor in earlier correspondence including 4 April 2021 but this weaker argument would have to be substantiated by evidence of the hardship including claims, expenses or notices sent by the suppliers to the contractor.
    b. Pursuant to Clause 14.8, claim financing charges.
    c. Pursuant to Clause 2.4, claim there is a failure to provide evidence of financial arrangements.
    d. Associated costs.
77. Claim in arbitration that the meeting of 31 May 2021 amended the payment terms by creating a new obligation to pay IPCs # 36, 37, and 38 by the end of June and that this amendment of terms is a separate ground of contractual liability. As stated, this argument is arguable but not strong.

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78. The Contractor should articulate its position regarding the performance bond and guarantee cheque, and the consequences that arbitration and termination will have in regards to them.
79. The Contractor may terminate its Contract with the Contractor by giving 14 days' notice and clearly evincing an intention to terminate.

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Appendix: Narrative

1. On 28 February 2021, the Engineer wrote to the Contractor rejecting its revised programme, noting an inconsistency between the software the Contractor was using to evaluate its progress and observations on-site. This includes submission of low-value IPCs and inadequate resources, and recommends increasing resources. (Exhibit 1)

2. Also on 28 February 2021, the Engineer wrote to the Contractor, rejecting its claim for force majeure as it had not been notified within 14 days of becoming aware of the event. (Exhibit 2)

3. On 7 March 2021, the Engineer wrote to the Contractor, reiterating its belief that the Contractor's methodology to evaluate its progress was flawed, and requesting that it deploy more resources. (Exhibit 3)

4. On 22 March 2021, the Engineer wrote to the Contractor, stating that its revised programme was insufficient, as it only discussed the completion date, not sequencing or the method of preparation, and reiterating its belief that progress had not been achieved. (Exhibit 4)

5. On 28 March 2021, the Contractor wrote to the Employer stating that Interim Payment Certificate #36 was due, in a sum of AED 9,704,063.07. (Exhibit 1) On 4 April 2021, the Contractor wrote to the Employer stating that IPC #36 had not been paid, and therefore that it could not pay its subcontractors. The Contractor instructed the Employer to pay immediately in order to avoid interruptions, and stated that it would not be responsible for delays, reductions in performance, and suspension of performance. (Exhibit 5)

6. On 4 April 2021, the Engineer wrote to the Contractor, stating that the force majeure issue had already been dealt with in the February 2021 correspondence. (Exhibit 6)

7. On 4 April 2021, the Contractor wrote to the Employer stating that IPC #36 was overdue, and that it would not be held liable for reduction or suspension of the Works. (Exhibit 7)

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8. On 5 April 2021, the Employer wrote to the Contractor, stating that it had given only 4 days' notice, but that 21 days' notice was needed to effect suspension of works properly under the contract. (Exhibit 8)

9. On 18 April 2021, the Engineer wrote to the Contractor, stat that it had not provided a sufficient revised programme; it had declined to provide information regarding critical MEP testing and commission. (Exhibit 9)

10. On 19 April 2021, the Contractor wrote to the Employer stating that it was unable to pay its subcontractors and suppliers due to the Employer's non-payment, and that it would reduce the rate of works from 22 April 2021. It also reminded the Employer that the Employer would be liable for remobilization delays and costs. (Exhibit 10)

11. On 22 April 2021, the Contractor wrote to the Engineer to explain to the Engineer that the delay in the payment under IPC #36 would create Risk Event #17, and that it would analyse the intermediate and final impact. (Exhibit 11)

12. On 29 April, the Engineer responded to the claimant, stating that it would await details regarding impact. It reiterated that the Contractor was required to demonstrate demobilization after 22 April 2021 in order to demonstrate remobilization. (Exhibit 12)

13. On 29 April 2021, the Contractor wrote to the Employer, stating that IPC #36 was overdue and that IPC #37 was now due. The Contractor requested that the Employer release both IPC #36 and PIC #37 "*to enable Contractor to resume normal working as soon as is reasonably practicable*." (Exhibit 13)

14. On 4 May 2021, the Contractor wrote to the Engineer, enclosing an Interim Delay Impact Report, in which it outlines delays to MEP works, ID works, and others. It also noted manpower reductions. (Exhibit 14)

15. On 9 May 2021, the Engineer wrote to the Contractor, acknowledging the revised programme, but also stating that a revised programme had been required of the Contractor in February 2021. (Exhibit 15)

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16. On 20 May 2021, the Contractor wrote to the Engineer, providing an extensive Extension of Time for Completion claim with a deficit of 64 days. In this document, the Contractor repeated the correspondence cited above to show that it had been unable to release overdue payments to subcontractors and suppliers. (Exhibit 16)

17. On 23 May, the Engineer wrote to the Contractor, stating that once the delay event was concluded and upon submission of final claim substantiation, it would engage in claim analysis. (Exhibit 17)

18. On 27 May 2021, the Contractor wrote to the Employer to request that it provide reasonable evidence of financial arrangement, pursuant to Sub-Clause 2.4 of the General Conditions of Contract. (Exhibit 18)

19. On 1 June 2021, the Contractor wrote to the Employer, stating that PICs # 36, 37, and 38 had not yet been received. It also stated that it had used up and that it had reduced its rate of work. **It cited Clause 16.1, regarding the 21-day notice requirement, but did not invoke it.** (Exhibit 19)

20. On 6 June 2021, the Contractor wrote to the Engineer, citing the failure of the Employer to pay PICs #36, 37, and now 38, attaching Interim Delay Impact Report #2 (Exhibit 20)

21. On 7 June 2021, the Engineer wrote to the Contractor, stating that its Delay Impact Report #2 was non-specific in nature and required a factual quantitative record. (Exhibit 21)

22. On 13 June 2021, the Employer wrote an email to the Contractor, stating that "*our tentative payment plan is… payment to bill no 36, 37, & 38 will be settled by the end of June*". It also stated that its discussions with its bank "*whilst very well advanced and positive, will only be finalized this coming week pending a final executive management meeting and we will keep you posted if there is any changes in the above mentioned plan*." (Exhibit 22)

23. On 15 June 2021, the Contractor wrote to the Engineer including a detailed, if not fully explicated factual record. (Exhibit 23)

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24. On 20 June 2021, the Contractor wrote to the Engineer, including its Extension of Time #10, detailing Delay Event #17, providing an extensive Extension of Time for Completion claim with a deficit of 97 days. (Exhibit 24)

25. On 23 June 2021, the Contractor wrote to the Employer repeating the sentence (without context) "*Payment to bill no 36, 37, & 38 will be settled by end of June*." Then the Contractor stated that based on this promise, the Contractor had committed to the plans of its subcontractors and suppliers. (Exhibit 25)

26. On 27 June 2021, the Contractor wrote to the Employer, stating that it was running out of essential supplies, that its equipment and plant were exposed, and that it had exhausted all methods for continuing work. (Exhibit 26)

27. On 12 July 2021, the Engineer wrote to the Contractor, stating that it was not in control of the release of funds, nor recommend the release of the Contractor's staff. All it could do was to recommend it rationalize its staff-to-labour ratios and submit them to the Engineer. (Exhibit 27)

28. On 12 July 2021, the Contractor wrote to the Engineer requesting advice regarding the termination of staff in order to mitigate its costs, despite creating prolongation costs later on. (Exhibit 21) On 13 July 2021, the Contractor sent a nearly identical letter to the Employer (Exhibit 28)

29. On 13 July 2021, the Contractor wrote a letter to the Employer stating that it had submitted a claim for EOT to the Engineer, and requesting the Employer's guidance regarding overhead costs, specifically related to manpower and whether it should reduce its staffing levels. (Exhibit 29)

30. On 18 July 2021, the Contractor wrote to the Engineer, including a revised Interim Extension of Claim, with a deficit of 126 days. (Exhibit 30)

31. On 18 July 2021, the Engineer wrote to the Contractor, stating that its claim was an ongoing event, and that it would review the final EOT claim when received. (Exhibit 31)

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32. On 25 July 2021, the Contractor wrote to the Engineer, again seeking advice regarding staffing and mobilization. (Exhibit 32)

33. On 26 July 2021, the Engineer wrote to the Contractor, deflecting its queries. It stated that commercial decisions were for the Contractor to decide. It stated that if the Employer had stated the project was overstaffed, it should follow that advice. (Exhibit 33)

34. On 5 August 2021, the Contractor wrote to the Employer, noting that now four IPCs had not been paid, stating that it may suspend or reduce its work. (Exhibit 34)

35. On 17 August 2021, the Contractor wrote to the Employer, mentioning a meeting that took place on 4 July 2021 and memorializing the discussion that took place at the meeting held on 11 August 2021. At this meeting, the Parties discussed new negotiations regarding project finance with CBD, a bank; the Contractor replaced its performance bond with a security cheque; discussions with "His Highness" regarding funding; the release of a payment of between AED 3 and 5 million; and supply chain disruptions due to lack of payment (Exhibit 35)

36. On 18 August 2021, the Contractor wrote to the Engineer, including a revised Interim Extension of Claim, with a deficit of 156 days. (Exhibit 36)

37. On 30 August 2021, the Contractor wrote to the Employer, stating that IPCs #36-40 were now overdue, that IPC #41 was due, and that a cumulative payment of AED 33,108,525.10 was now due. It stated that it would exercise its rights under Clause 16.1 and suspend works from 1 September 2021. (Exhibit 37)

38. On 6 September 2021, the Contractor sent a letter to the Employer, informing the Employer of its suspension of work on 1 September 2021. It stated that during the reduction period (misstated as the suspension period) it had sought to maintain essential works. It noted that the Employer had not responded to its letters regarding staffing. Finally, it mentioned there had been no follow up regarding finance due mid-September. (Exhibit 38)

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Date of JD/LLB	**May 8, 2024**
Class Rank	**I am not ranked**
Law Review/Journal	**Yes**
Journal(s)	**Alabama Civil Rights & Civil Liberties Law Review**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**

Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Specialized Work Experience	**Habeas**

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June 27, 2023

The Honorable Judge Bess M. Parrish Creswell
United States Bankruptcy Court for the Middle District of Alabama
One Church Street
Montgomery, AL 36104

Dear Judge Creswell,

I am currently completing my final year at the University of Alabama School of Law, where I am the recipient of a merit scholarship covering the entirety of my law school tuition. I also serve as a Senior Editor of the Alabama Civil Rights & Civil Liberties Law Review, the 3L Representative to the Student Bar Association's Elections Committee, and the Vice Chairperson of the DEI Committee. I am writing to express my interest in a clerkship in your chambers for the 2024-2025 clerkship term.

My background in Religious Studies and Middle East/South Asia Studies has equipped me with a robust understanding of cultural diversity and its implications within the legal system. Moreover, my legal experience is varied and comprehensive. As an intern with the Capital Habeas Unit with the Federal Public Defenders in the Middle District of Alabama, I had the privilege of serving clients on Alabama's Death Row. This role required careful attention to detail, thoughtful legal analysis, and a deep commitment to justice. Later, as a Law Clerk with The Alabama Disabilities Advocacy Program, I worked closely with clients at the Taylor Hardin Secure Medical Facility in Tuscaloosa, AL. These experiences honed my ability to conduct thorough legal research and advocacy.

As a hopeful Term Law Clerk, I fully appreciate the gravity of serving as an ambassador for the Court. I am steadfastly committed to preserving the Court's dignity, its high standards, and its esteemed values in every interaction. My professionalism and respect extend to all court staff, attorneys, and any individuals I encounter within this role. The magnitude of confidentiality within this position is not lost on me. I assure you of my unflinching discretion, whether it pertains to sensitive legal matters we handle or the internal dialogues within our chambers. My stint as a Judicial Extern for the Honorable Senior Judge Myron H. Thompson of the United States District Court for the Middle District of Alabama in 2022-2023 has honed these essential skills. I learned firsthand the delicate balance between openness in chamber discussions and the absolute necessity for confidentiality. I am eager to bring this nuanced understanding, along with my unwavering dedication to professionalism and decorum, to the role of Term Law Clerk.

Finally, I understand that the role of a Term Law Clerk is not confined to standard working hours. I am prepared to work evenings and weekends to meet the demands of the Court. I see this role as an opportunity to make a direct impact on important legal issues, contributing to the lives of individuals navigating the legal process, and gaining invaluable experience that will influence my future legal career. Thank you for considering my application. I am looking forward to potentially discussing my application further.

Respectfully,

Bachittar Anoop Singh

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Doctor of Jurisprudence (J.D.) Candidate, May 2024
Honors: Merit Scholarship Recipient 2021-2024 • Awarded *Dean's Community Service Award* • Awarded *Student Pro Bono Award* • Awarded *Order of Samaritan*

Activities: Vice Chairperson, *DEI Committee* • Senior Editor, *Alabama Civil Rights & Civil Liberties Law Review (Vol. 14, and Vol. 15)* • Founder, *Middle Eastern/South Asian Law Students Association* • J.D. Admissions Student Ambassador • Class Representative, *SBA Elections Committee* • Member, *Black Law Students Association* • Member, *OUTLaw* • Rookie, *SCRC Division I Alabama Rugby*

THE UNIVERSITY OF CALIFORNIA, Davis, CA
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B.A. in Religious Studies (focus in Entomology), Sept. 2011

Activities: Co-Founder, *Middle Eastern & South Asian Students' Council* • Co-Founder and Board Member, *Bhagat Puran Singh Health Initiative* • Founder and Executive Member, *Sikh Cultural Association* • Tutor (Math and Biology), *Davis Senior High School*

LEGAL EXPERIENCE

NATIONAL HEALTH LAW PROGRAM (NHeLP), Los Angeles, CA
Spitzer Intern, May 2023 – Present

FOSTER LAW FIRM, Vestavia Hills, AL
Law Clerk, Oct. 2022 – Present
- Assist with case specific research, including drafting memoranda and motions, researching case law and any legal precedent where relevant;
- Analyze legal documents and briefs, ensuring accurate state and depiction of facts, case law and precedent provided.

U.S. DIST. CT. FOR THE MIDDLE DISTRICT OF ALABAMA, Montgomery, AL
Judicial Extern to the Hon. Senior Judge Myron H. Thompson, Aug. 2022 – May 2023
- Conducted in-depth legal research on relevant statues, case law and legal precedent; and
- Drafted court documents including sentencing memoranda, judicial opinions and orders, and other legal documents as directed by Judge and Court Clerk.

ANONYMOUS ACADEMICS LLC, Washington, D.C.
Legal Research Assistant, Feb. 2023 – April 2023

- Assisted with project research and writing as requested in relation to environmental, social, and governance (ESG) audits.

JOHNSON FISTEL, LLP, San Diego, CA
Law Clerk, Oct. 2022 – Jan. 2023

- Provided support to associates and partners by conducting legal research;
- Analyzed legal documents and briefs, ensuring accurate state and depiction of facts, case law and precedent provided;
- Prepared a variety of legal documents including affidavits, petitions, and pleadings; and
- Drafted court documents and supporting papers.

ENSAAF, INC., Pleasanton, CA
Program Director, Sept. 2011 – Oct. 2022; *Various Other Positions*

- Organized and managed the Punjab Documentation Project (PDP); the largest initiative in the history of India to document disappearances and unlawful killings by the Indian security forces;
- Translated primary source documents, including legal documents, from Punjabi, Hindi and Urdu to English;
- Classified and analyzed court documents, census lists, affidavits, and other legal documents to identify senior security officials who perpetrated gross human rights violations in Punjab, India; and
- Drafted case documents and assist in the preparation of legal documents and other materials.

THE UNIVERSITY OF ALABAMA SCHOOL OF LAW, Tuscaloosa, AL
Research Assistant for Professor Shalini B. Ray, May 2022 – Oct. 2022

- Conducted in-depth legal research on various topics concerning administrative agency law and immigration law, specifically in relation to Title 42, Deferred Action for Childhood Arrivals (DACA), and Migrant Protection Protocols (MMP).

FEDERAL PUBLIC DEFENDER PROGRAM, Montgomery, AL
Capital Habeas Unit (CHU) Legal Intern, June 2022 – Aug. 2022

- Assisted the teams in providing representation to persons charged with federal crimes in the twenty-three southeastern counties of Alabama and to people on Alabama's death row whose appeals are entering federal *habeas corpus*; and
- Assisted attorneys and investigators at all stages of client representation, including interviewing clients and witnesses, reviewing, and organizing discovery materials, researching federal constitutional and criminal law issues, and investigating and preparing cases for pleadings, hearings and/or trials.

ALABAMA DISABILITIES ADVOCACY PROGRAM (ADAP), Tuscaloosa, AL
Law Clerk, May 2022 – Aug. 2022

- Advocated for individuals entitled to Home and Community-Based Waiver Service in the State of Alabama;
- Helped detainees at the Taylor Hardin Secure Medical Facility secure their constitutional right to treatment under the standards of *Wyatt v. Stickney* and the Americans with Disability Act (ADA); and

- Assisted attorneys and investigators at all stages of client representation, including reviewing and organizing discovery materials, researching state and federal constitutional issues, and preparing cases for hearings, litigation, and/or trial.

IMMIGRANT DETENTION DEFENSE BOARD (IDDB), Tuscaloosa, AL
Board Member, Aug. 2021 – April 2022

- Researched and drafted federal *habeas corpus* petitions for individuals detained by I.C.E. in the Etowah County Detention Center in Alabama; reviewed client intakes; collaborated with Adelante Alabama in hosting "Know Your Rights" training for detainees.

THE LAW OFFICES OF ROBERT B. JOBE, San Francisco, CA
Legal Translator, May 2019 – March 2020

- Conducted-virtual and in-person-client intake interviews at a nationally recognized asylum and deportation defense firm based in San Francisco, California; and
- Translated legal documents, witness testimonies, affidavits, and other primary source documents, from Punjabi, Hindi and Urdu to English.

PUBLICATIONS & RESEARCH ACKNOWLEDGEMENTS

- Abigail Coursolle & Bachittar Singh, *Towards Inclusivity and Cultural Competency: Transforming the Health Care Landscape for LGBTQ+ in California*, NAT'L HEALTH LAW PROGRAM (Jun. 21, 2023), https://healthlaw.org/towards-inclusivity-and-cultural-competency-transforming-the-health-care-landscape-for-lgbtq-in-california/.
- Deepa Das-Acevedo, *Autocratic legalism in India: A roundtable,* 13 JINDAL GLOBAL L. REV. 117 (2022), https://doi.org/10.1007/s41020-022-00171-y.
- Yao-Hua Law & J.A. Rosenheim, *Effects of combining an intraguild predator with a cannibalistic intermediate predator on a species-level trophic cascade*, 92(2) ECOLOGY, 333 (2011), https://rosenheim.faculty.ucdavis.edu/wp-content/uploads/sites/137/2014/09/Law-Rosenheim-2011-Ecology.pdf.

COMMUNITY SERVICE

JAKARA MOVEMENT, Fresno, CA
Youth Organizer and Volunteer, June 2008 – Present

THE APPELLATE PROJECT (TAP), Washington, D.C.
Mentee, Sept. 2022 – May 2023

FRESNO CHAFFEE ZOO, Fresno, CA
Zookeeper Assistant, June 2006 – Aug. 2007

LANGUAGES & OTHER INTERSTS

Languages

- Punjabi (Native) • Urdu (Fluent) • Hindi (Fluent) • English (Fluent)

Other Interests

- Indo-Greek Architecture • Hiking • Camping • Backpacking • Anime • Entomology

BACHITTAR ANOOP SINGH (He/Him)
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Unofficial Academic Transcript

Institution Name: The University of Alabama School of Law
Student ID: 12182099

Course		Professor	Grade	Term
LAW 668	Complex Litigation	Adam Steinman	B-	Spring 2023
LAW 690	Water Law	Heather Elliott	B+	Spring 2023
LAW 795	Judicial Externship	Hon. S. Judge Myron H. Thompson	Pass (P/F)	Spring 2023
LAW 798	Advanced Fed. Gov. Contracts	Cameron Fogle	A	Spring 2023
LAW 818	Advanced Contracts	Yonathan Arbel	A-	Spring 2023
LAW 819	International Human Rights Law	Clare Ryan	B	Spring 2023
LAW 631	Employment Law	Deepa Das Acevedo	C+	Fall 2022
LAW 741	Federal Government Contracts	Cameron Fogle	B-	Fall 2022
LAW 744	Legislative Drafting	Othni Lathram	B+	Fall 2022
LAW 753	Racial Equity Audits in ESG	Johnjerica Hodge, India Williams	B	Fall 2022
LAW 795	Judicial Externship	Hon. S. Judge Myron H. Thompson	Pass (P/F)	Fall 2022
		2L Term GPA (2022-2023)	3.05	
LAW 600	Contracts	Gene Marsh	C+	Spring 2022
LAW 601	Property	Fredrick Vars	B	Spring 2022
LAW 609	Constitutional Law	Paul Horwitz	C+	Spring 2022
LAW 648	Legal Research/Writing II	Kimberly Boone	B-	Spring 2022
LAW 742	Legislation and Regulation	Deepa Das Acevedo	B	Spring 2022
LAW 602	Torts	Benjamin McMichael	C+	Fall 2021
LAW 603	Criminal Law	Joyce Vance	B-	Fall 2021
LAW 608	Civil Procedure	Adam Steinman	B	Fall 2021
LAW 610	Legal Research/Writing I	Kimberly Boone	B-	Fall 2021
LAW 713	Introduction to Study of Law	Anita Kay Head	Pass (P/F)	Fall 2021
		1L Term GPA (2021-2022)	2.64	
		CUMULATIVE GPA	2.81	

LAW 646	The Law of War	Daniel Joyner	-	*Fall 2023*
LAW 660	Legal Profession	Shalini Ray	-	*Fall 2023*
LAW 665	Criminal Defense Clinic	Amy Kimpel, Yuri Linetsky	-	*Fall 2023*
LAW 665	Criminal Defense Clinical Course	Amy Kimpel, Yuri Linetsky	-	*Fall 2023*
LAW 683	Administrative Law	Shalini Ray	-	*Fall 2023*
LAW 821	Public Interest Lawyering	Glory McLaughlin	-	*Fall 2023*

ALABAMALAW
THE UNIVERSITY OF ALABAMA
Office of the Dean

8 June 2023

Re: Recommendation for Bachittar Anoop Singh

Dear Judge:

Bachittar Singh is a rising 3L at the University of Alabama School of Law. I write to commend him to you for a clerkship in your chambers. I do so with unbridled enthusiasm.

Bachittar is a person with special experience, perspective, and talent. I dare say that Alabama Law has never had a student quite like him – and I intend this in the most complimentary way possible. He came to us, not directly from college, but after having spent more than a decade working for (and eventually exercising directorial responsibility in) an organization whose purpose is to gather documentary and other evidence concerning the Sikh experience in India. It's work about which he is passionate, knowledgeable, and articulate.

Alabama is not an obvious destination for a person with his background and interests. So he took a chance in coming to us. But we have benefitted in countless ways from his membership in our community, and I believe he would tell you that he has flourished here. He has done so in his course work (which has been meaty and substantive), through his extracurricular portfolio (which has been truly impressive in scope and depth), and through his participation in the daily life of the Law School (and beyond).

I got to know Bachittar before he matriculated here. Since then, he and I have had regular, lengthy, and deep conversations about law, society, and his personal experiences. From the beginning, he displayed a maturity, perceptiveness, and knowledge that have had a profound impact on me, even as a grizzled veteran in academe. He has a keen analytical mind and an ability to think across multiple levels of abstraction simultaneously. His grades in courses do not – and could not – fully comprehend scope of his impressive gifts.

He has bolstered his academic experience with a host of additional experiences: as a judicial extern to a celebrated Senior District Judge for the Middle District of Alabama; as a clerk for law firms in Birmingham, Alabama, and San Diego, California; as a research assistant for one of my professorial colleagues; as a legal research assistant for a firm in Washington, DC; as a legal intern for the Federal Defender Program in the Middle District of Alabama; as a law clerk for the Alabama Disabilities Advocacy Program; as a Board Member for the Immigrant Detention Defense Board in Tuscaloosa; and (currently) as a Spitzer Intern for the National Health Law Program in Los Angeles.

Mark E. Brandon - Dean and Thomas E. McMillan Professor of Law
Office of the Dean | 251 Law Center | Box 870382 | 101 Paul W. Bryant Drive | Tuscaloosa, AL 35487-0382
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Letter of Recommendation
Bachittar Anoop Singh
Page 2

Because my primary responsibilities have been administrative, I have not had an opportunity to engage Bachittar in the classroom. On the basis of my extensive interactions with him, however, I have every confidence that he will be a judicial clerk of genuine excellence. He reads well (and widely). He processes information rapidly. He analyzes cogently. He writes well. And he is able to manage multiple assignments with ease. I am pleased to recommend him for the important work in your chambers.

Please don't hesitate to let me know if you have questions or would like additional information.

Very truly yours,

June 27, 2023

The Honorable Bess Creswell
Frank M. Johnson, Jr. United States Courthouse
One Church Street, Room 401-C
Montgomery, AL 36104

Dear Judge Creswell:

I am writing to enthusiastically recommend Bachittar Singh for a clerkship in your chambers. I was closely involved in recruiting Bachittar to Alabama Law and have since had the pleasure of teaching him in two courses. Beyond this, Bachittar has become a much-valued mentee and aide, playing a crucial role in two conferences I organized while at Alabama Law and liaising between students, faculty, and administrators at the Law School. In my experience, Bachittar's drive, organizational skill, intellectual appetite, and emotional intelligence are without parallel.

When I first met him as a prospective student, Bachittar already had extensive experience with legal systems outside the United States thanks to his work for Ensaaf. I wondered whether this prior knowledge would complicate his law school career, but my concerns were soon laid to rest: regardless of his experience (which is broad) and interests (which are varied) Bachittar approaches every new opportunity with humility and an eagerness to learn. More than any other student I have taught, Bachittar has used his time in law school to experience as many different ways of engaging with the law as possible; his energy and enthusiasm are inspiring.

He understands, however, that energy and enthusiasm are not enough in the legal profession: diligence, accuracy, and intellectual creativity are necessary too. I know this first hand after asking Bachittar to participate in a roundtable on autocratic legalism in India that I organized in 2021; Bachittar not only came excellently prepared to the meeting and contributed to our discussion in key ways, he also took detailed minutes for me to use later on and carefully read the roundtable transcript for accuracy and citations. Others have also quickly recognized his aptitude for legal work: to date he is the only judicial extern from Alabama Law to be hired into the chambers of Judge Myron H. Thompson of the Middle District of Alabama. The sheer variety of Bachittar's activities during law school—he has worked in law firms, judicial chambers, non-profits, as an academic research assistant, with the Federal Defenders, the ADAP, and the IDDB—signals his commitment to becoming the best lawyer he can be.

Some of the qualities that I most appreciate in Bachittar are also likely to make him a valuable addition to your judicial chambers. He is a highly capable and well-informed conversational sparring partner who is nevertheless unfailingly respectful and polite. He is always well-prepared, whether this means doing outside research and writing before a meeting or simply formulating his own thoughts (or both). And he is an exceptionally warm, caring, and perceptive human being: not only from my own experiences, but also from the comments of colleagues and students at Alabama Law, I know Bachittar to be someone who uses his skills and resources in the service of those around him. He is someone I am proud and humbled to have taught.

As the above makes obvious, I recommend Bachittar highly and without reservation. Please feel free to contact me by phone or email if there is any additional information that I can provide.

Yours sincerely,

Deepa Das Acevedo

Associate Professor

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I prepared the following sentencing memorandum in September of 2022, for the Honorable Senior Judge Myron H. Thompson of the United States District Court for the Middle District of Alabama. The task entailed thorough research on all pertinent issues, case laws, and federal sentencing guidelines associated with the case. I independently conducted all required research for this assignment.

Respectfully,

Bachittar Anoop Singh

MEMORANDUM

To: **Judge**

From: **Bachittar Singh**

Date: [redacted] **2022**

Case: [redacted]

Re: [redacted] **Revocation Hearing**

A revocation hearing is set for [redacted] **on the pending petition for the revocation of defendant** [redacted] **supervised release. The petition contains the following charges:**

(1) **Failure to pay restitution as ordered;**
(2) **Driving under the influence of alcohol** [redacted];
(3) **Driving under the influence of alcohol** [redacted].

Because [redacted] **is alleged to have failed to pay restitution as ordered in violation of the conditions of his supervised release, and because he is alleged to have committed a Grade C violation, if he is ultimately found guilty you may revoke his term of supervised release and impose a term of imprisonment under 18 U.S.C. § 3583(e)(3) and USSG § 7B1.3(a)(2).**

[redacted] **has pled guilty to both charges of Driving Under the Influence (DUI) in the** [redacted] **District Court on** [redacted] **202**[redacted]**, and is required to have an ignition interlock device installed on his vehicle for a period of one year and to participate in a substance abuse aftercare program.**

It is unclear whether [redacted] **will be contesting any of the charges against him, though it seems unlikely that he will. Probation recommends a sentence of three months' incarceration followed by no supervised release.**

MEMORANDUM

I. Defendant's Background

a. Personal Background

[redacted] is [redacted] years old and was born in [redacted]. [redacted] mother passed away in 2005 due to cancer, and his father resides in [redacted] and is employed as a truck-driver.

[redacted] was not subjected to any physical or emotional abuse as a child, and he specifically describes his relationship with his mother as "great." His relationship with his father is more difficult and varies depending on his "[father's] mood."

Due to a learning disability, [redacted] dropped out of high school and did not earn his GED.

In 2002, [redacted] married [redacted]. Although the couple subsequently divorced on October [redacted], 201[redacted], [redacted] and his ex-wife continue to remain in a relationship and are currently cohabitating in [redacted], alongside their three children: [redacted]. Ms. [redacted] is a nurse at [redacted].

b. Mental Health

The PSR says that [redacted] does not have any evidence of having been treated for any mental or emotional problems. In addition, he did not report any family history of mental or emotional health conditions.

c. Substance Abuse

In the PSR interview, [redacted] denied a history of, or problem with, alcohol/substance abuse, [redacted] has

reported consuming two to three beers once a week. In addition, he admitted that he regularly began using marijuana between the ages of 14 and 16.

The USPO's sentencing recommendation states: "[redacted] admits he began abusing alcohol in early 202[redacted] and was ultimately arrested for the two driving under the influence of alcohol cases in [redacted] that form the basis for the petition to revoke his term supervised release. Since incurring the new law violations, [redacted] successfully completed inpatient substance abuse treatment."

d. Criminal History

[redacted] has a lengthy criminal history consisting almost entirely of citations in relation to traffic violations, including speeding (nine citations), seatbelt violation (four citations), and no child restraint (three citations).

Apart from his underlying convictions in this case, [redacted] was arrested for Driving Under the Influence (DUI) in [redacted] and charged with reckless driving. In that case, he was ordered to pay a $500 fine by the [redacted] Probate Court in [redacted].

e. Educational and Employment History

[redacted] withdrew from high school in the ninth (9th) grade and has not completed his GED. Between 1996 and 2007, [redacted] reported working as a laborer [redacted]. Thereafter, from May 2007 to August 2007, he was employed as a laborer [redacted]. And, between August 2007 to 2017, he was employed as a Heavy Equipment Operator [redacted]. More recently, from 2017 to the present, [redacted] has been self-employed as the owner of a lawn care service.

MEMORANDUM

II. Underlying Offense and Conditions of Supervised Release

[redacted] was originally sentenced in 201[redacted] to time served (one day) as to Count One, followed by a three (3) year term of supervised release after having pled guilty to making a false statement to a federal agency under 18 U.S.C. § 1001(a)(2), a Class D felony.

In that case, [redacted] was indicted by a Federal Grand Jury for knowingly and willfully making a "materially false, fictious, and fraudulent statement" to an FBI Special Agent in relation to a [redacted] package containing $[redacted] in cash. The Grand Jury determined that he did not return the [redacted] package to [redacted], as he initially claimed to the FBI Special Agent, and had in fact spent a portion of the $[redacted] on personal expenditures. [redacted].

As per his special conditions, [redacted] was to make restitution for a total restitution amount of $[redacted] at the rate of not less than $100 per month and began his term of supervised release on September [redacted] 201[redacted].

III. Alleged Violation of Supervised Release

On September [redacted] 201[redacted], [redacted] began his term of supervised release, and began to pay restitution in the amount of $[redacted] at the rate of not less than $100 per month, as is required by the special conditions of his supervised release. However, [redacted] has not made any additional payment since [redacted] 202[redacted], and is currently in default status.

In February 202[redacted], a [redacted] Sheriff's Deputy clocked [redacted] vehicle traveling at 58 miles per hour (MPH) in a 45 MPH speed zone. After conducting a traffic stop near [redacted] home, the Deputy reported a

strong odor of alcohol on [redacted]. He administered a field sobriety test and determined that [redacted] was "too impaired to safely operate a vehicle." After administering a portable breathalyzer test to [redacted], in which his blood alcohol content (BAC) level was recorded at 0.18, the deputy arrested and charged him with Driving Under the Influence (DUI).

Shortly thereafter, in April 202[redacted], an [redacted] state trooper conducted a traffic stop on [redacted] and administered a portable breathalyzer test. [redacted] BAC level was 0.13, and he was arrested and charged with his second Driving Under the Influence (DUI) within a two-month period, in violation of his supervised release.

IV. Events After the Filing of the Revocation Petition

After the filing of the revocation petition, you continued the revocation hearing to allow [redacted] to attend substance-abuse treatment [redacted] and modified the conditions to add the condition that he is successfully complete the inpatient treatment program at [redacted]. He completed the program successfully.

V. Sentencing Options

a. Statutory Requirements

[redacted] is alleged to have violated the terms of supervised release by failing to pay restitution as ordered by the United States District Court [redacted] and by committing two new law violations of Driving Under the Influence of Alcohol (DUI). Therefore, if he is found guilty of

those charges, you may revoke his term of supervised release and, additionally, impose a sentence of "not more than two (2) years for a Class D felony." 18 U.S.C. § 3583(e)(3).

b. Sentencing Guidelines

When there is more than one violation of the conditions of supervision, the grade of violation is determined by the violation having the most serious grade. Here, all of [redacted] violations are Grade C violation; "therefore, the grade of violation is Grade C." USSG § 7B1.1(a)(3)(B).

At the time of the original sentence in 201[redacted], [redacted] criminal history category was I, with a total offense level of eight (8). The guidelines range here is therefore three (3) to nine (9) months imprisonment, USSG 7B1.4, provided that, where minimum term of imprisonment determined is not more than six (6) months, the minimum term may be satisfied by:

(A) a sentence of imprisonment; or
(B) a sentence of imprisonment that includes a term of supervised release that substitutes community confinement or home detention.

USSG 5C1.1(e); see also USSG § 7B1.3(c)(1).

Upon finding of a Grade C violation, the court may:

(A) revoke probation or supervised release; or
(B) extend the term of probation or supervised release and/or modify the conditions of supervision.

USSG § 7B1.3(a)(2). No credit toward any sentence of imprisonment ordered shall be given for time [redacted] has already served on post-release supervision. See USSG § 7B1.5(b). Additionally, "[a]ny term of imprisonment

imposed upon [] revocation … shall be ordered to be served consecutively to any sentence of imprisonment that the defendant is serving, whether or not the sentence of imprisonment being served resulted from the conduct that is the basis of the revocation of … supervised release." Id. § 7B1.3(f).

c. Parties' Recommendations

Probation recommends that [redacted] supervised release be revoked and that he be sentenced to three months' imprisonment, consecutive to the sentence imposed in [redacted], and followed by no supervised release. The USPO wants no supervised release because [redacted] supervised release term started on September [redacted], 201[redacted], and three years will be up on September [redacted], 202[redacted] (though the filing of the petition arguably stopped the clock).

According to Probation, [redacted] has served [redacted] days in custody on the [redacted] DUI cases.

We don't have any information about what the government or defense will request, but I imagine the defense will request a concurrent sentence with the [redacted] case and/or time served.

d. Bachittar's Recommendation

Here, I see two grounds for a variance. First, [redacted] began his term of supervised release on September [redacted], 201[redacted], and continued to pay restitution at the rate of not less than $100 per month until [redacted] 202[redacted], the date of his last payment. The court should take into consideration that the State of [redacted] reported a record number of daily cases between 2,000 and 4,000 new infections of COVID-19 being reported in December of 202[redacted]. *See* WSFA 12 News Staff,

MEMORANDUM

Alabama has reported 95K new COVID-19 cases in December, WSFA 12 News (Dec. 28, 2020, 2:58 PM GMT-6), https://www.wsfa.com/2020/12/28/alabama-has-reported-k-new-covid-cases-december/. In addition, at his original sentencing, the Court noted, "[redacted] does not appear to have the ability to pay a fine, within the guidelines, in addition to restitution." See [No.] [redacted] [of] [redacted] [in] [redacted]. He was reported to have had a negative monthly cash flow of $[redacted]. *Id*. The court should take this possible (negative) correlation between the COVID-19 Pandemic and the date of [redacted] having entered default status into consideration, in addition to the documented financial hardship as noted by the District Court [redacted].

Second, as per the Supervised Release Violation Report (the "Report"), the only non-compliance issue during [redacted] first two (2) years of supervision was the failure to pay restitution as ordered by the Court. And, since his second DUI charge in April of 202[redacted], [redacted] has successfully completed inpatient substance abuse treatment at [redacted]. The fact that prior to, and subsequently after, this underlying conviction in 201[redacted], [redacted] has been charged with multiple Driving Under the Influence (DUI) highlights a possible dependence on alcohol. If so, I doubt that a lengthy period of incarceration would be beneficial in significantly addressing the continued risk he would pose upon the completion of his sentence. Perhaps the court could better protect society by requiring [redacted] to undergo a psychiatric evaluation to see if he meets the criteria for substance use disorder. Perhaps the court should require participation in a driving school course, a financial management course, a recovery program, such as Alcoholics Anonymous, and/or therapy might better address the underlying cause of [redacted] dependency on

MEMORANDUM

alcohol and his default status. If [redacted] maintains his sobriety, he is well-positioned to continue "earning a good income to support himself and his family. He has acquired valuable tools from treatment to live a sober, law-abiding life." See [redacted] [in] Supervised Release Violation Report. I might recommend something along the lines of a downward variance of one (1) month of incarceration, followed by two (2) years of supervised release, with a special condition that [redacted] continue to pay restitution at a rate determined to be appropriate by the court, attend a driving course, undergo a psychiatric evaluation to see if he meets criteria for substance use disorder, participate in a recovery program, such as Alcoholics Anonymous, and enroll in an inpatient substance abuse treatment program.

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In March of 2023, I composed this memorandum specifically for Greg Foster, a legal professional practicing at Foster Law Firm, located in Vestavia Hills, Alabama. The task necessitated meticulous research on all matters of relevance and case laws specifically pertaining to the topic of arbitration. All the research indispensable for this undertaking was carried out solely by me.

Please note, any confidential information has been removed and received clearance by Greg Foster himself.

Best Regards,

Bachittar Anoop Singh

FOSTER LAW

ATTORNEY-CLIENT PRIVILEGED WORK PRODUCT

MEMO

Date: March 26, 2023
Case: [redacted] *Arbitration*
Re: Apparent Authority #2 [redacted]
To: Greg Foster
From: Bachittar Singh

Hours:

March 23, 2023 – 0.4 Hours
March 26, 2023 – 0.7 Hours

TOTAL HOURS WORKED: **1.1 Hours**

Issue: What is the current state of the law concerning apparent authority in the context of enforcing an arbitration in a nursing home context?

MEMO 1.0 –

Firstly, in order to determine what the current law is concerning the doctrine of apparent authority in the context of an arbitration agreement between a third-party and a nursing home in Alabama, it's important to define the doctrine of apparent authority as upheld by the Alabama Supreme Court. The State Court has previously held:

> [I]n order for a principal to be held liable under the doctrine of apparent authority and estoppel, the principal must have engaged in some conduct which led a third party to believe that the agent had authority to act for the principal.

Kindred Nursing Centers East, LLC v. Jones, 201 So.3d 1146, 1155 (Ala. 2016) (quoting *Northington v. Dairyland Ins. Co.*, 445 So.2d 283, 286 (Ala. 1984)). The Alabama Court of Civil Appeals has also similarly reasoned that apparent authority "is implied where the principal passively permits the agent to appear to a third person to have the authority to act on [his/her] behalf." *Treadwell Ford, Inc. v. Courtesy Auto Brokers, Inc.*, 426 So.2d 859, 861 (Ala.Civ.App. 1983).

In the context of a nursing home, as recently as August 2022, the Alabama Supreme Court, citing its previous caselaw, iterated the principle that:

> [O]nce a nursing-home defendant submits an arbitration agreement that appears on its face to have been signed by a person with authority, the burden is then on the plaintiff to submit evidence that the signatory lacked apparent authority. Such evidence could include circumstances that put the defendant on notice that the signatory lacked authority, such as prior or contemporaneous objection by the resident. [internal citations omitted]

Ball Healthcare Services, Inc. v. Flennory, 2022 WL 3572584, at *4 (Ala. 2022). In *Ball Healthcare Services, Inc.*, was explicitly addressing the issue of whether there existed a valid arbitration agreement between the personal representative of resident's estate and the nursing home. And while the Alabama Supreme Court held that the son failed to rebut the existence of an arbitration agreement there, the representative plaintiff was an authorized representative of the decedent as recognized by the Court; therefore, legally able to enter into a contract binding on the decedent.

Part 1 – How does a nursing-home establish "apparent authority"?

MEMO 2.0 –

Repeatedly, the Alabama Supreme Court has affirmed the principle that "[t]he burden of proving agency rests upon the party asserting it." *SSC Montgomery Cedar Crest Operating Co., LLC v. Bolding*, 130 So.3d1194, 1199 (Ala. 2013) (internal citation omitted); *see also Johnson v. Shenandoah Life Ins. Co.*, 281 So.2d 636, 641 (Ala. 1973) ("Apparent authority must be traceable to the principal."); *Noland Health Services, Inc. v. Wright*, 971 So.2d 681, 686 (Ala. 2007) (purposing the principle that "one who purports to act merely as a 'next friend' of a 'non compos mentis' is 'wholly without authority to make any contract that would bind her or her estate.'").

There, the Alabama Supreme Court, in determining whether there existed an arbitration agreement between the parties, addressed the defendant nursing-home's claim that the principal's daughter had legal authority to bind principal. In affirming the lower court's judgment in favor of plaintiff, the Court referred to "the only evidence in the record in [the] case [which] indicate[d] that [principal] is incompetent and thus unable to empower an agent, whether passively or through affirmative acts." *SSC Montgomery Cedar Crest Operating Co.*, 130 So. at 1199. However, the Court did specify that:

> However, we emphasize that this conclusion is not reached because Means did not personally execute the DRA. Rather, it is because all the evidence in the record indicates that Means is incompetent. Thus, while Bolding, as the holder of a durable power of attorney granted by Means, may have been able to bind him to an arbitration agreement, Pleasant, as merely a family member or next friend, could not.

130 So. at 1199.

Lastly, in *Kindred Nursing Centers East, LLC v. Jones*, when holding that the sufficiency of evidence supported the defendant nursing-home's argument that the plaintiff daughter had apparent authority to bind principal to agreement, the Alabama Supreme Court explicitly relied on the insufficiency of the evidence in failing to establish that the principal was mentally incompetent. 201 So.3d 1146, 1157 (Ala. 2016). Therefore, the Court stated:

> [B]ecause this Court's precedent holds that competent residents of nursing homes can be bound by arbitration agreements executed by their representatives, we hold that Jones is so bound. Moreover, in view of the evidence indicating that Jones passively permitted Barbour to act on her behalf in signing the admission forms and the lack of evidence indicating that Jones ever objected to Barbour's signing those forms, we hold that Barbour had the apparent authority to bind Jones at the time Barbour signed the admission documents. Under these circumstances, Whitesburg Gardens proved the existence of a valid contract calling for arbitration.

Id.

In conclusion, while it does not appear that there is a concrete list of factors that a nursing-home need establish to prove apparent authority in Alabama, there does seem to exist a specific threshold that that must be satisfied that is "traceable" to the principal; and the burden of satisfying this standard is on the defendant nursing-home.

Part 2 – What is helpful under agency principals to destroy this apparent authority argument? And what are the elements of proving the existence of apparent authority?

MEMO 3.0 –

"The third party's belief that an individual is an agent or employee of the principal must be 'objectively reasonable'; what the third party 'subjectively perceived' is immaterial to the analysis." *Bain v. Colbert County Northwest Alabama Health Care Authority*, 233 So.3d 945, 956 (Ala. 2017) (internal citation omitted). In *Bain*, the Alabama Supreme Court summarized the doctrine of apparent authority as follows:

> While some suggestion has been made that a distinction exists between apparent authority and authority grounded on estoppel, ... our cases and authority generally base the two upon the same elements.
>
> As between the principal and third persons, mutual rights and liabilities are governed by the apparent scope of the agent's authority which the principal has held out the agent as possessing, or which he has permitted the agent to represent that he possesses and which the principal is estopped to deny.

> Such apparent authority is the real authority so far as affects the rights of a third party without knowledge or notice ....
>
> When one has reasonably and in good faith been led to believe, from the appearance of authority which a principal permitted his agent to exercise, that a certain agency exists, and in good faith acts on such belief to his prejudice, the principal is estopped from denying such agency ....
>
> The apparent authority of the agent is the same, and is based upon the same elements as the authority created by the estoppel of the principal to deny the agent's authority; that is to say, the two are correlative, inasmuch as the principal is estopped to deny the authority of the agent because he has permitted the appearance of authority in the agent, thereby justifying the third party in relying upon the same as though it were the authority actually conferred upon the agent.

Id. at 956 (internal quotations and citations omitted). Quoting *Malmberg v. American Honda Moto Co.*, the State Court further conceded that "[t]he test for determining whether an agency existed by … 'apparent authority' is based upon the potential principal's holding the potential agent out to third parties as having the authority to act." *Id.* (quoting *Malmberg v. American Honda Motor Co.*, 644 So.2d 888, 891 (Ala. 1994)).

Applicant Details

First Name	**Ryan**
Last Name	**Tsivitse**
Citizenship Status	**U. S. Citizen**
Email Address	**rptsivit@iu.edu**
Address	**Address** Street **250 S. Washington St** City **Bloomington** State/Territory **Indiana** Zip **47408** Country **United States**
Contact Phone Number	**2485683183**

Applicant Education

BA/BS From	**Michigan State University**
Date of BA/BS	**May 2019**
JD/LLB From	**Indiana University Maurer School of Law** **http://www.law.indiana.edu**
Date of JD/LLB	**May 6, 2023**
Class Rank	**50%**
Law Review/Journal	**Yes**
Journal(s)	**Indiana Law Journal**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**No**

Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Leeb, Jeff
jleeb@gvwgroup.com
Conrad, Stephen A.
conrads@indiana.edu
855-3737
Nagy, Donna
dnagy@indiana.edu
8128562826

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Ryan Tsivitse

1833 Cloverdale Drive • Rochester, MI 48307 • (248) 568-3183 • rptsivit@iu.edu

June 25, 2023

The Honorable Bess M. Parrish Creswell
Judge, United States Bankruptcy Court
Middle District of Alabama
One Church Street
Montgomery, Alabama 36104

Dear Judge Creswell:

I am writing to apply for a clerkship with your chambers beginning in September 2024. I graduated from the Indiana University Maurer School of Law this past May, and I hope to have the opportunity to work in your chambers. I am interested in a bankruptcy clerkship because as a graduate who is pursuing a career in bankruptcy law, clerking in your chambers would significantly improve my knowledge of bankruptcy law. Bankruptcy is an area of law that I enjoyed exploring during my time as a summer law clerk, and it is an area that I hope to learn more about and eventually practice in my future career. I want to work in the area of bankruptcy law because I want to learn more about the processes of litigation and working through complicated legal issues that businesses and individuals need help solving.

Although I am from Michigan, I spent both of my law school summers in Alabama. Following my first year of law school, I worked in Birmingham as a legal intern at Autocar, LLC, where I researched and wrote about how changing laws across multiple states in areas such as employment law and franchise law affected employees and the company. Last summer, I was a summer law clerk at Burr & Forman, where I drafted transactional documents and did research and writing in a variety of areas of law, including financial services and bankruptcy. This August, I will begin a one-year judicial clerkship for a state trial court judge in New Jersey, where I hope to further improve my legal research and writing skills.

Throughout law school, I improved my writing skills by taking classes that have made my writing clear and concise. As a member of my law school's flagship journal, the *Indiana Law Journal*, I developed skills that are essential for lawyers, including paying attention to detail as an associate editor and reviewing legal writing as an articles editor. I have also served my community by volunteering with the student organization Outreach for Legal Literacy, through which I taught local elementary students lessons in government and law.

A clerkship in your chambers would be an invaluable opportunity to learn more about the laws of bankruptcy. I would be a reliable clerk who would serve your chambers with integrity. I would welcome the opportunity to interview with you, and I look forward to hearing from you. Thank you for your time and consideration.

Best Regards,

Ryan Tsivitse

Ryan Tsivitse

1833 Cloverdale Drive • Rochester, MI 48307 • (248) 568-3183 • rptsivit@iu.edu

EDUCATION

Indiana University Maurer School of Law — Bloomington, IN
Juris Doctor, GPA: 3.519 — Spring 2023

- Full-Tuition Merit-Based Scholarship Recipient
- Dean's Honors (Spring 2021, Spring 2022, Fall 2022)
- Articles Editor, *Indiana Law Journal* (Spring 2022-Spring 2023)
- Associate, *Indiana Law Journal* (Fall 2021-Spring 2022)
- Academic Achievement Award (Summer 2021)
- Treasurer, Business & Law Society (Spring 2021-Spring 2022)
- Member, Outreach for Legal Literacy (Fall 2020-Spring 2023)

Michigan State University James Madison College — East Lansing, MI
Bachelor of Arts, International Relations, GPA: 3.48 — Spring 2019

EXPERIENCE

University of Manchester
Research Assistant — Spring 2023

- Collaborated with University of Manchester professors Michael Galanis and Vincenzo Bavoso
- Wrote research memoranda regarding short selling and the short squeeze of "meme stocks"

Indiana University Maurer School of Law — Bloomington, IN
Research Assistant for Executive Associate Dean Donna Nagy — Summer 2022-Winter 2022

- Proofread and cite checked chapters of a securities litigation casebook authored by Dean Nagy
- Wrote a memo regarding the applicability of insider trading law to crypto assets

Burr & Forman — Birmingham, AL
Summer Associate — Summer 2022

- Drafted articles of incorporation and by-laws for a non-profit organization
- Researched the effect of odometer fraud on a retail installment contract
- Drafted an operating agreement for a limited liability company
- Prepared a memo regarding cost-shifting the costs of a subpoena for an interested non-party

Autocar, LLC — Birmingham, AL
Legal Intern — Summer 2021

- Reviewed trademark guidelines for the company's marketing team and suggested revisions
- Researched regulations and prepared a memo regarding the use of medium and heavy-duty electric trucks
- Prepared a memo regarding the applicability of franchise law in New Jersey to an Autocar distributor

Indiana University Maurer School of Law — Bloomington, IN
Dean's Bicentennial Research Assistant — Summer 2020

- Researched Maurer School of Law alumni and coordinated alumni interviews with fellow research assistants
- Created reports on the alumni's careers and advice they shared for incoming law students

Herculeze Technologies Inc. — Rochester, MI
Operations Manager — Spring 2019-Summer 2020

- Launched peer-to-peer local delivery website that gained 200+ driver and customer signups in its first month
- Cultivated partnerships with local businesses by meeting with companies such as Mattress To Go
- Generated over $5,000 in revenue during the website's first three months
- Delivered a business pitch to a group of 100+ members of the Metro Detroit business community

INTERESTS

- Detroit Lions, Major League Baseball, weightlifting, classic rock

Academic Record of **Tsivitse, Ryan**

Graduated from **Michigan State University** on 5/1/2019. Major: International Relations.

Student ID: 0003391505

J.D. awarded on 5/5/2023

Indiana University
Maurer School of Law -- Bloomington

I Semester 2020-2021

Contracts	Tomain, J.	B501	4.0	B
Legal Res & Writing	Daghe, L.	B542	2.0	B
Legal Profession	Wallace, S.	B614	1.0	S
Civil Procedure	Janis, M.	B533	4.0	B
Torts	Lubin, A.	B531	4.0	B

Sem 42.00/14=3.00 `Cum 42.00/14.0=3.000 Hours passed 15.0

II Semester 2020-2021

Constitutional Law I	Sanders, S.	B513	4.0	A
Legal Profession II	Henderson, B.	B614	3.0	B+
Legal Res & Writing II	Daghe, L.	B543	2.0	B+
Property	Krishnan, J.	B521	4.0	A-
Criminal Law	Hoffmann, J.	B511	3.0	B+

Dean's Honors Sem 57.20/16=3.58 `Cum 99.20/30.0=3.307 Hours passed 31.0

I Semester 2021-2022

Intro to Income Tax	Lederman, L.	B650	4.0	A-
Indiana Law Journal	Sanders, S.	B674	1.0	S
Corporations	Henderson, B.	B653	3.0	B+
Trusts & Estates	Stake, J.	B645	3.0	A-
*#S Corporate Law	Nagy, D.	L690	3.0	A

Sem 47.80/13=3.68 `Cum 147.00/43.0=3.419 Hours passed 45.0

II Semester 2021-2022

Indiana Law Journal	Sanders, S.	B674	1.0	S
#Const History Colloq	Conrad, S.	B760	3.0	A
Securities Regulation	Nagy, D.	B727	3.0	A-
Land Use Controls	Stake, J.	B615	3.0	A-
^Business Planning	Sullivan, K.	B632	2.0	A-

Dean's Honors Sem 41.60/11=3.78 `Cum 188.60/54.0=3.493 Hours passed 57.0

I Semester 2022-2023

Indiana Law Journal	Sanders, S.	B674	1.0	S
Civil Procedure II	Geyh, C.	B534	3.0	B+
*S Tax Policy	Gamage, D.	L773	3.0	A
^Negotiations	Hoeksema, J.	B620	2.0	B+
*S Law & Development	Ochoa, C.	L750	3.0	A-
State & Local Tax	Blair, B.	B649	2.0	W
International Law	Lubin, A.	B665	3.0	A

Dean's Honors Sem 51.60/14=3.69 `Cum 240.20/68.0=3.532 Hours passed 72.0

II Semester 2022-2023

Indiana Law Journal	Sanders, S.	B674	1.0	S
Estate Planning	Retzner, R.	B740	2.0	B+
Directed Research	Nagy, D.	B707	2.0	S
Evidence	Orenstein, A.	B723	4.0	B-
^#Higher Ed & the Law	Gaines, J.	B658	2.0	A
*S Law & Democracy	Almendares, N.	L799	3.0	A
#Securities Litigation	Williams, C.	B648	2.0	A-

Sem 44.80/13=3.45 `Cum 285.00/81.0=3.519 Hours passed 88.0

Hours Incomplete 0.0

Doctor of Jurisprudence awarded on 5/5/2023

Grade and credit points are assigned as follows: A+ or A = 4.0; A- = 3.7; B+ = 3.3; B = 3.0; B- = 2.7; C+ = 2.3; C = 2.0; C- = 1.7; D = 1.0; F = 0. A "C-" grade in our grading scheme reflects a failing grade and no credit. An "F" is reserved for instances of academic misconduct. At graduation, honors designation is as follows: Summa Cum Laude - top 1%; Magna Cum Laude - top 10%; Cum Laude - top 30%. For Dean Honors each semester (top 30% of class for that semester) and overall Honors determination, grades are not rounded to the nearest hundredths as they are on this record. Marked (*) grades are Highest Grade in class. Since this law school converts passing grades ("C" or higher) in courses approved from another college or department into a "P" (pass grade), for which no credit points are assigned, there may be a slight discrepancy between the G.P.A. on this law school record and the G.P.A. on the University transcript. Official transcripts may be obtained for a fee from the Indiana University Registrar at the request of the student .

122698

June 25, 2023

The Honorable Bess Creswell
Frank M. Johnson, Jr. United States Courthouse
One Church Street, Room 401-C
Montgomery, AL 36104

Dear Judge Creswell:

I am General Counsel of GVW Group, LLC, a privately held group of affiliated businesses operating in the heavy duty truck manufacturing, aftermarket parts distribution, engineering and IT industries.

Ryan was an intern for our Legal team over Summer 2021, after his first year of law school, at our primary manufacturing operating company, Autocar, based in Birmingham Alabama. We have a small legal team that serves the affiliated companies' legal needs, which cover a broad range of disciplines.

Ryan was given a number of widely varying assignments intended both to allow him to see and experience varied challenges within our businesses, and to address questions or issues that were indeed highly relevant and important.

Notwithstanding our limited resources and training capabilities, Ryan demonstrated strong ability to understand issues and identify key questions. He created work product efficiently that reflected sound analyses, and communicated clearly findings, recommendations and open issues. To the extent we saw opportunities to coach, and allow Ryan to refine or follow-up on questions, Ryan eagerly sought and accepted guidance to provide the best and most responsive counsel and support.

Our Legal team thoroughly enjoyed working with Ryan, and we found him to be personable and supportive of our efforts in serving our internal clients.

In my opinion, Ryan should be given every consideration for a clerkship, or for any other opportunities.

Sincerely,
Jeffrey Leeb

Jeff Leeb - jleeb@gvwgroup.com

June 25, 2023

The Honorable Bess Creswell
Frank M. Johnson, Jr. United States Courthouse
One Church Street, Room 401-C
Montgomery, AL 36104

Dear Judge Creswell:

I write to recommend Ryan Tsivitse for a clerkship in your chambers.

Ryan was my student last semester in a small-enrollment course on constitutional history and theory. The reading assignments proved challenging for many students in the course. But the first essay that Ryan submitted for the course— and that I graded blind-- put him in a class by himself from the outset. In my marginal comments I remarked repeatedly on how insightful I found his understanding-- of a notoriously difficult scholarly article, I might add.

I was so impressed with what Ryan had to say, and with how well he said it, that in short order I found myself relying on him to help direct and moderate our round-table classroom discussions. In the class there were some of our most accomplished students in the Class of '23; but Ryan proved unique in helping me to make the most out of our discussions. Not only did he have an unusually good grasp of my own purposes for the course, he also seemed to be the best student in the room when it came to drawing the best out of others.

It is indeed both Ryan's insightfulness and his talent for working with others that led me to urge him to apply for a judicial clerkship.

He is, in fact, such an unusually gratifying student to work with that this past summer I have remained in contact with him— most particularly to trade thoughts on what makes for good legal writing. He is partial to lucidity and precision, while I, as a an academic for decades now, am inclined to write with a complexity that, I grant and intend, makes a reader work hard to get the rewards that I think I am offering my reader. In other words, I have found— in the classroom and in blindly graded work product -- that the way Ryan thinks and writes is a good influence on me; and I enjoy learning from him. Rare is the student about whom I say any such thing.

Thus, I commend to you Ryan as a skilled assistant and also a worthy collaborator— just the thing for the distinctive workplace that is a judge's chambers.

Yours truly,

Stephen A. Conrad
Ph.D., J.D. Professor of Law
IU Maurer School of Law
Bloomington, IN 47405

June 25, 2023

The Honorable Bess Creswell
Frank M. Johnson, Jr. United States Courthouse
One Church Street, Room 401-C
Montgomery, AL 36104

Dear Judge Creswell:

I am delighted to write in support of Ryan Tsivitse's application to be your law clerk for the 2023-24 term. I had the pleasure of teaching Ryan last year in two of my courses here at Indiana University Maurer School of Law: my Fall 2021 Corporate Law Seminar—Insider Trading and Securities Market Abuses and my Spring 2022 course in Securities Regulation. Ryan also worked for me this summer as a research assistant. I therefore stand well positioned to provide this wholehearted recommendation.

Ryan was an excellent student and earned A grades in my seminar and my Securities Regulation course. Although the subject matters were closely linked, the two courses provide students with the opportunity to develop and demonstrate quite different skills, and Ryan's performance in both impressed me greatly.

In the seminar, Ryan contributed a thoroughly researched, thoughtfully organized, and very well-written paper, and he generated lively and productive class discussion during his paper presentation. His paper explored how members of Congress who are suspected of insider trading based on confidential government information can use the Speech or Debate Clause of the U.S. Constitution to effectively preclude investigation and prosecution by the Securities and Exchange Commission or the Department of Justice. But what distinguished Ryan's seminar paper from most of those by his classmates was that he also proposed an original solution to the problem he highlighted: he suggested that as a lesser intrusive alternative to current legislative proposals that would ban outright the ownership of stock in publicly traded companies by Senators and Representatives, Congress should seek from its members who wished to continue owning and trading such stock a limited speech or debate privilege waiver that would extend only to SEC or DOJ investigations and prosecutions related to their personal stock trading. I very much enjoyed working with Ryan on this creative project and found him to be a student with high standards for his written work as well as appreciative of and responsive to my suggestions.

Ryan was also among my top students in Securities Regulation. He was a frequent and engaging participant in class discussions, and his incisive questions and comments contributed greatly to the course's overall success. Ryan's final examination, like his in-class performance, demonstrated a strong command of the complicated federal securities law statutes and rules. It also reflected the clear thinking and analytical reasoning that is necessary for successful problem-solving.

Ryan's work as my summer research assistant was likewise consistently excellent. He cheerfully assisted with proofreading and cite-checking several chapters of the manuscript for the new edition of my Securities Litigation casebook, which demanded careful attention to detail under tight deadlines. In addition, with minimal guidance or effort on my part, Ryan prepared a truly useful memorandum on recent SEC and DOJ enforcement actions involving insider trading in crypto-assets. As with his seminar paper, Ryan's memo reflected rigorous research, sound judgment in providing context without overloading on details, and top-notch writing skills.

For all of these reasons, I believe that Ryan would excel as your law clerk. He would work incredibly hard to meet and exceed your expectations, and your chambers would benefit from his dedication, intelligence, energy, and enthusiasm. If I may be of any further assistance in your evaluation of Ryan's application, please do not hesitate to contact me. I can be reached at 812-856-2826 or dnagy@indiana.edu.

Sincerely,

Donna M. Nagy
Acting Executive Associate Dean and
C. Ben Dutton Professor of Business Law
IU Maurer School of Law

Ryan Tsivitse

250 S. Washington • Bloomington, IN 47408 • (248) 568-3183 • rptsivit@iu.edu

Writing Sample

The attached writing sample is an objective research memorandum written during my time as a summer associate at Burr & Forman. The memorandum addresses the issue of whether courts will cost-shift the costs of complying with a subpoena for an interested non-party. Although benefiting from comments from my mentor, this writing sample represents my original work.

MEMORANDUM

To: **Law Firm Partner**

From: **Ryan Tsivitse**

Date: **June 17, 2022**

Re: **Cost-shifting the costs of a subpoena for an interested non-party in a Chapter 7 bankruptcy**

Issue: Will courts cost-shift the costs of complying with a subpoena for an interested non-party?

Federal Rule of Civil Procedure 45(d)(1) protects non-parties who are subpoenaed from the undue burden and expense of complying with the subpoena.[1] The Rule imposes a duty on the party requesting a third-party subpoena to take reasonable steps to avoid imposing undue burden and expense on the party subject to the subpoena.[2] In a cost-shifting inquiry, courts will consider whether the subpoena imposes expenses on the non-party and whether those expenses are significant.[3]

Courts have historically considered seven factors when deciding whether to shift costs.[4] The non-party's interest in the outcome of the case, the ability of the parties to bear the costs, the public importance of the litigation, the scope of discovery, the invasiveness of the request, the extent to which the producing party must separate responsive information from privileged or irrelevant material, and

[1] *See* F.R.C.P. 45(d)(1); *see also* In re: Blue Cross Blue Shield Antitrust Litig., No. 2:13-cv-20000-RDP, 2018 WL 11425554, at *2 (N.D. Ala. Oct. 24, 2018).
[2] F.R.C.P. 45(d)(1).
[3] United States v. McGraw-Hill Companies, 302 F.R.D. 532, 534 (C.D. Cal. 2014).
[4] *See id.*

the reasonableness of the costs of production were all factors that courts considered prior to a 1991 amendment to Rule 45 of the Federal Rules of Civil Procedure.[5]

Following the amendment of Rule 45 in 1991, the cost-shifting inquiry shifted to whether or not the non-party faced a significant expense.[6] The Ninth Circuit held that the only consideration is whether the subpoena imposes significant expense on the non-party.[7] The D.C. Circuit court held that the amendment to Rule 45 requires cost-shifting in all instances in which a non-party incurs a significant expense that results from compliance, and that the party seeking discovery should bear at least enough of the cost of compliance to render the remaining expense non-significant.[8]

Courts will only shift costs that result from complying with the subpoena.[9] Expenses that are not caused by compliance or that do not result from compliance with the subpoena are not compensable.[10]

For many courts, only reasonable expenses are compensable.[11] An unreasonable expense is one that does not result from complying with the subpoena.[12] Unnecessary or excessively expensive costs that are incurred in complying with the subpoena will also be considered unreasonable.[13] What is

[5] *See id.*
[6] *See* Legal Voice v. Stormans, Inc., 738 F.3d 1178, 1184 (9th Cir. 2013).
[7] *See id.*
[8] Linder v. Calero-Portocarrero, 251 F.3d 178, 182 (D.C. Cir. 2001).
[9] *See* In re: Blue Cross Blue Shield Antitrust Litig. at *2.
[10] *See id.*
[11] *See* G&E Real Estate, Inc. v. Avison Young–Washington, D.C., LLC, 317 F.R.D. 313, 316 (D.D.C. 2016).
[12] *See id.*
[13] *See* In re: Blue Cross Blue Shield Antitrust Litig. at *3.

considered reasonable is determined by the discretion of a trial court.[14] A non-party who moves for costs and fees bears the burden of demonstrating that the costs and fees are reasonable.[15]

In determining whether an expense is "significant," a court may consider the non-party's ability to bear the costs of producing the subpoena.[16] An expense that is considered significant for a small business would likely be considered insignificant for a global financial institution.[17]

Courts may require non-parties to bear some or all of the expenses where the particular equities of the case demand it.[18] In determining whether a non-party should bear the costs, courts consider the factors of "whether the non-party actually has an interest in the outcome of the case, whether the non-party can more readily bear its costs than the requesting party, and whether the litigation is of public importance."[19] Although these factors predate the 1991 amendment to Rule 45, at least one court has stated that the amendment does not overturn prior case law in which these factors were considered.[20]

Regarding a party having an interest in the outcome of the case, in *In re Exxon Valdez*, the court determined that a non-party that relied on a defendant for

[14] *See id.*
[15] S*ee id.*
[16] *See* McGraw-Hill Companies, Inc. at 536.
[17] *See id.*
[18] *See* Wells Fargo Bank, N.A. v. Konover, 259 F.R.D. 206, 207 (D. Conn. 2009).
[19] Linder v. Calero-Portocarrero, 180 F.R.D. 168, 177 (D.D.C. 1998).
[20] *See supra* note 3.

29% of its income weakened its claim that it was a neutral party.[21] In another case, a non-party that was substantially involved in the underlying transaction and could have anticipated that the failed transaction could result in litigation was also considered to not be a neutral non-party.[22] Courts also view non-parties involved in litigation arising out of the same facts as the litigation that they are a non-party to as not neutral parties for the purposes of awarding costs.[23] An interested party will more likely have to bear the costs of complying with the subpoena.[24]

Regarding bearing the costs of compliance, a court determined that a non-party with gross receipts of $58 million and a net worth of $17 million meant that it could readily bear the costs of compliance.[25] Another court determined that a non-party could bear the costs of compliance because it had received $700,000 in contributions.[26] In one case in which both the defendant and the non-party were large corporations with resources to bear the costs of compliance, the non-party was not considered to be more readily able to bear the costs of the subpoena.[27] The greater the ability of the non-party to bear the costs of compliance, the more likely it will have to bear the costs of compliance.[28]

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[21] In re Exxon Valdez, 142 F.R.D. 380, 384 (D.D.C. 1992).
[22] In re First American Corp., 184 F.R.D. 234, 242 (S.D.N.Y. 1998).
[23] *See id.*
[24] *See supra* note 21.
[25] *See id.*
[26] *See* Stormans, Inc. v. Selecky, No. C07–5374 RBL, 2015 WL 224914, at *7 (W.D. Wash. Jan. 15, 2015).
[27] *See* In re: Blue Cross Blue Shield Antitrust Litig. at *8.
[28] *See supra* note 21.

Finally, regarding the litigation being of public importance, one court determined that an action that involved bank fraud was considered one of public importance.[29] A case involving a widely-publicized oil spill was also found to be of public importance.[30] If a matter is found to be of public importance, it is more likely that the non-party will have to bear the costs of compliance.[31]

If the client wants to shift the costs of complying with the subpoena, it will likely need to show that the costs it faces are significant. The client will need to show that it faces significant expenses that result from complying with the subpoena, and that its expenses are reasonable. If the client can show that the expenses it faces are significant, it should be compensated for the expenses that are considered significant.

It might be determined that the costs to the client are not significant, and that it has to bear the costs of compliance. However, the client can argue that that party requesting the documents could more easily bear the costs of complying with the subpoena.

If a court decides to balance the equities to determine who should bear costs, the client will have to show that it does not meet the three factors of the balance the equities test. Although the client is an interested party, the client can argue that opposing party is better situated to financially handle the cost of the subpoena, and

[29] *See supra* note 22.
[30] *See* In re Exxon Valdez at 381.
[31] *See* Behrend v. Comcast Corp., 248 F.R.D. 84, 86 (D. Mass. 2008).

that similar to the non-party in the *In re Exxon Valdez* case, it is being subpoenaed by a party that is better situated to handle the costs of the subpoena.

The client can also argue that the dispute that the client is involved in is not one of public importance, which means that the client should not have to bear the costs of compliance.

Based on the facts at issue, the client will likely have to bear the costs of compliance. However, if the costs of compliance are significant, the client should argue that it should not bear the costs of complying. If the court decides to balance the equities, the client should argue that the opposing party is better situated to handle the costs of compliance and that the dispute is not one of public importance, which means that it should not have to pay the costs of complying with the subpoena.